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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

THE CELOTEX CORPORATION and
CAREY CANADA INC.,
et al.,

Petitioners

v.

SCHOOL DISTRICT OF LANCASTER,
et al.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Is a Fed.R.Civ.P. 23(b)(3) nationwide class action a permissible vehicle for the adjudication of thousands of toxic tort and products liability claims which are governed by state law and which involve numerous different types of products used over a period of more than thirty years?

2. Would a district court's determination of the level at which airborne asbestos fibers constitute a hazard in all schools in a Fed.R.Civ.P. 23(b)(3) nationwide class action violate the separation of powers doctrine and established principles of federalism?

3. May a Fed.R.Civ.P. 23(b)(3) nationwide class action be certified without an analysis of the elements of plaintiffs' claims and the proof they propose to offer to establish those claims?

4. Can a nationwide class action satisfy Fed.R.Civ.P. 23(b)(3)'s superiority requirement and fairly and efficiently adjudicate alleged toxic tort and products liability claims which are subject to the varying laws of over fifty jurisdictions?

PARTIES TO THE PROCEEDING

Armstrong World Industries, Inc., Asbestos Corporation, Ltd., Bell Asbestos Mines, Ltd., The Celotex Corporation, Carey Canada Inc., Dana Corporation, Fibreboard Corporation, Flintkote Company, Forty-Eight Insulations, Inc., GAF Corporation, H.K. Porter Co., Keene Corporation, Lac D'Amiante du Quebec, Ltee., National Gypsum Company, Owens-Corning Fiberglas Corporation, Owens-Illinois, Inc., Pittsburgh Corning Corporation, Raymark Industries, Inc., Southern Textile Corporation, United States Gypsum Co., U. S. Mineral Products Company, Uniroyal, Inc., W.R. Grace & Co.

School District of Lancaster, Manheim Township School District, Lampeter-Strasburg School District, Board of Education of the Memphis City Schools, Napa Valley Unified School District, Barnwell School District No. 45, Anchorage School District, Cinnaminson Township Board of Education, Board of Education of the City of Clifton, New Jersey, Board of Education of Anderson County, Hawkins County, Johnson County, Knox County, Knoxville City and Loudon County, Tennessee, Columbus, Ohio Board of Education, Los Angeles Unified School District, City of New York and Board of Education of the City School District of the City of New York, the Mayor and City Council of Baltimore, Lancaster County Area Vocational-Technical Schools, San Jose Unified School District, Spartanburg County, South Carolina School District Number Seven.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

THE CELOTEX CORPORATION
AND CAREY CANADA, INC.,

Petitioners

v.

SCHOOL DISTRICT OF LANCASTER,
et al.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

INTRODUCTION

Petitioners seek the issuance of a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in *In re School Asbestos Litigation*, 789 F.2d 996 (3d Cir. 1986), affirming the certification, under Rule 23(b)(3) of the Federal Rules of Civil Procedure, of a nationwide class of public and private schools ("school districts") for the litigation of the plaintiff school districts' toxic tort and products liability claims.

This Court has often repeated the admonition that, in making the determination of whether an action may proceed as a class action, "careful attention to the requirements of Fed. Rule Civ. Pro. 23 [is] indispensable." *East Texas Motor Freight v. Rodriguez*, 431 U.S. 395, 405 (1977); *see also General Telephone Co. v. Falcon*, 457 U.S. 147, 160 (1982) ("actual, not presumed, conformance with Rule 23(a) remains . . . indispensable"). Indeed, the Court has declared that lower courts must subject a purported class representative's claims to a "rigorous analysis" to determine whether the requirements of Rule 23 are satisfied. *General Telephone Co., supra*, 457 U.S. at 161.

Petitioners submit that the Third Circuit's Rule 23(b)(3) decision warrants review and reversal by this Court because the Third Circuit has permitted an unprecedented expansion of Rule 23 in a manner which conflicts with decisions of other federal circuits and which sanctions significant departures by the District Court from the accepted and usual course of judicial proceedings.

In an effort to avoid engaging in what it termed "theoretical musings," and in an attempt to induce the resolution of the thousands of individual state law claims involved in these actions, the Third Circuit has relaxed the standards of Rule 23, broken with the well-established precedent that a class action is an improper vehicle for the resolution of toxic tort and products liability actions, and approved the certification of a massive and unwieldy class proceeding that will defy all attempts at case management,

confuse the class action jury and deny individual defendants their right to a fair hearing on the issues raised in the Complaints.

Moreover, the Third Circuit's decision inevitably requires the District Court to determine the level at which airborne asbestos fibers in schools nationwide constitute a hazard. This matter has been—and remains—under active consideration by the United States Congress, the federal Environmental Protection Agency ("EPA") and state legislatures across the country. The decision of the Third Circuit effectively pre-empts legislative and regulatory jurisdiction of these matters and vests that jurisdiction in a federal district court, sitting in diversity, under the guise of a Rule 23 "common question." Thus, the Third Circuit's decision violates the doctrine of separation of powers (by invading the province of Congress and the EPA) and established principles of federalism (by depriving state legislatures of the right to devise their own varying solutions to this complex problem).

OPINIONS BELOW

The opinion of the Third Circuit is reported at *In re School Asbestos Litigation*, 789 F.2d 996 (3d Cir. 1986). The opinion of the District Court is reported at *In re Asbestos School Litigation*, 104 F.R.D. 422 (E.D. Pa. 1984).

JURISDICTION

The Third Circuit filed its opinion on May 1, 1986 and denied rehearing and rehearing in banc on June 2, 1986. This Petition is filed within ninety days of the date of the denial of rehearing. The jurisdiction of this Court is based on 28 U.S.C. §1254(1).

COURT RULES INVOLVED

The text of Rule 23(a) and Rule 23(b)(3) of the Federal Rules of Civil Procedure is set forth in the Appendix.

STATEMENT OF THE CASE

The present actions are three products liability suits which have been consolidated in the United States District Court for the Eastern District of Pennsylvania. The six named plaintiff school districts — three from Pennsylvania, one from South Carolina, one from Tennessee and one from California — seek to represent a nationwide class of school districts to recover the costs allegedly associated with the inspection, testing and abatement of a wide variety of asbestos-containing products in school buildings, plus punitive damages, under several legal theories. Named as defendants are over fifty separate companies representing diverse functions in the chain of distribution: miners, bulk suppliers, brokers, assemblers, manufacturers, distributors and at least one contractor.

In contrast to many toxic tort and products liability actions, these actions involve neither a single product nor a generic product. Nor do they result from a single incident or accident. Rather, they involve a multitude of distinct products with different purposes and characteristics which were used in numerous types of applications at various times over a period of more than thirty years. Indeed, within any particular building, these various products were often installed at different times and put to different uses.

In addition to the diversity of products, each of the over fifty defendants is situated differently with respect to its mining, manufacturing, distributing or contracting activity, its geographic market and customers, the time periods of its sales and, in fact, whether its fiber, product or installation work has any connection whatsoever to a particular school.

Plaintiffs allege that they have incurred, or will incur, costs in testing for the presence of friable (*i.e.*, easily crumbled) asbestos-containing products in their school buildings and in taking remedial steps to remove or encapsulate the friable products. The claims that the named plaintiffs seek to litigate on behalf of the putative class do not arise under any federal statute or reg-

ulation, nor are they controlled by any body of federal law.[1] The Complaints allege state law claims of negligence, strict liability in tort, intentional tort, breach of warranty, concert of action and civil conspiracy and, accordingly, will require the application of the varying state laws of over fifty jurisdictions which govern the production, sale and distribution of allegedly unsafe and defective products. The subject matter jurisdiction of the District Court is alleged solely on the basis of diversity of citizenship pursuant to 28 U.S.C. §1332.

On September 28, 1984, the District Court certified an unprecedented nationwide class of school districts under Rule 23(b)(3) against all defendants on the issue of compensatory damages and an identical nationwide class of school districts under Rule 23(b)(1)(B) on the issue of punitive damages. *In re Asbestos School Litigation*, 104 F.R.D. 422 (E.D. Pa. 1984). The District Court concluded that a "common core" of four issues would predominate over any individual issues presented by plaintiffs' various claims and that "management problems can be overcome." *Id.* at 432, 434.

The four issues which the District Court considered to be common to the class and which it held would predominate over all individual issues are: (a) the general health hazards of asbestos; (b) defendants' knowledge or reason to know of the health hazards of asbestos; (c) defendants' failure to warn/test; and (d) defendants' concert of action and/or conspiracy involving formation of and adherence to industry practices. *Id.* at 429.

On interlocutory appeal, pursuant to 28 U.S.C. §1292(a)(1) and 28 U.S.C. §1292(b), the Third Circuit vacated the Rule 23(b)(1)(B) certification for punitive damages but affirmed the Rule 23(b)(3) compensatory damage class certification, "despite

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1. Neither the Asbestos School Hazard Detection and Control Act of 1980, 20 U.S.C. §3601 *et seq.*, nor regulations promulgated by the EPA directing school districts to inspect and test for the presence of friable asbestos, 40 C.F.R. §763.100 *et seq.*, require any school district to conduct any abatement, nor do they provide any standard for determining liability on the part of any defendant for the costs of inspection or for any remedial measures undertaken by the schools.

[the Court of Appeals'] misgivings on manageability," its "reservations as to the breadth of the district court's [common question] analysis," and "some doubt" as to whether the many variations in the applicable state laws presented an obstacle that could be overcome. *In re School Asbestos Litigation, supra*, 789 F.2d at 998, 1009, 1010. On June 2, 1986, the Third Circuit denied rehearing and rehearing in banc. On June 18, 1986, the Third Circuit stayed the issuance of its mandate as to the appeals of certain defendants until July 31, 1986.

Petitioners seek the issuance of a Writ of Certiorari for the review by this Court of the Third Circuit's judgment affirming the District Court's Rule 23(b)(3) class certification decision.

REASONS FOR GRANTING THE WRIT

I. THE THIRD CIRCUIT'S DECISION REQUIRES SUPREME COURT REVIEW BECAUSE A FED. R. CIV. P. 23 (b)(3) NATIONWIDE CLASS ACTION IS NOT A PERMISSIBLE VEHICLE FOR THE ADJUDICATION OF THOUSANDS OF TOXIC TORT AND PRODUCTS LIABILITY CLAIMS WHICH ARE GOVERNED BY STATE LAW AND WHICH INVOLVE NUMEROUS DIFFERENT TYPES OF PRODUCTS USED OVER A PERIOD OF MORE THAN THIRTY YEARS

The Third Circuit's affirmance of the District Court's Rule 23(b)(3) class certification decision is contrary to a long history of class action jurisprudence and will have enormous consequences in future class litigation in toxic tort and products liability cases. No appellate court has ever before affirmed the certification of a nationwide toxic tort or products liability action as a class proceeding where, as here, the claims sought to be litigated on a class basis involve numerous different types of products of varying composition, produced, distributed and installed by many defendants over a period of more than thirty years in jurisdictions with varying state laws. Unless reviewed and reversed by this Court, the Third Circuit's decision improperly will permit the relaxation of Rule 23 standards in toxic tort and products liability cases in a manner that conflicts with decisions of the

Ninth Circuit and district courts in other circuits and inappropriately will sanction significant departures from the accepted and usual course of judicial proceedings.

Courts, with rare exception, have recognized that class action treatment is inappropriate for resolution of the predominantly *uncommon* questions of fact and law inherently characteristic of products liability and toxic tort actions. Accordingly, class certification has repeatedly been denied or vacated in cases involving asbestos,[2] urea formaldehyde foam insulation,[3]

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2. *Cleveland Board of Education v. Armstrong World Industries, Inc.*, 22 Ohio Misc. 2d 18, 476 N.E.2d 397 (Ohio Ct.C.P. 1985) (school asbestos property damage); *Kohr v. Johns-Manville Corp.*, No. 78-3942 (E.D. Pa. Sept. 5, 1979); *McDaniel v. Johns-Manville Sales Corp.*, No. 77-C-3534 (N.D. Ill. May 7, 1979); *Yandle v. PPG Industries, Inc.*, 65 F.R.D. 566 (E.D. Tex. 1974); *see also In re Asbestos School Products Liability Litigation*, 606 F. Supp. 713 (J.P.M.L. 1985) (denying transfer for coordinated or consolidated pretrial proceedings of federal school asbestos actions); *In re Asbestos and Asbestos Insulation Material Products Liability Litigation*, 431 F. Supp. 906 (J.P.M.L. 1977) (denying transfer for coordinated or consolidated pretrial proceedings in federal asbestos personal injury actions); *contra Board of Education of the School District of the City of Detroit v. The Celotex Corporation*, No. 84-429634 NP (Mich. Cir. Ct., Wayne County Sept. 6, 1985) (certifying a state class of those school asbestos property damage claimants choosing not to participate in the instant federal class action).

3. *Brummett v. Skyline Corp.*, No. C 81-0103-L(B) (W.D. Ky. June 3, 1985); *Caruso v. Celsius Insulation Resources, Inc.*, 101 F.R.D. 530 (M.D. Pa. 1984); *Pearl v. Allied Corp.*, 102 F.R.D. 921 (E.D. Pa. 1984); *Kuhn v. Skyline Corp.*, No. 83-0942 (M.D. Pa. Aug. 7, 1984); *Delaney v. Borden, Inc.*, 99 F.R.D. 44 (E.D. Pa. 1983); *Sanders v. Tailored Chemical Corp.*, 570 F. Supp. 1543 (E.D. Pa. 1983); *O'Connor v. Borden*, Civ. 80-4201 (D.S.D. Sept. 30, 1982); *Fletcher v. Cape Cod Gas Co.*, No. 41603 (Mass. Super. Ct. Jan. 24, 1984); *Flury v. Borden, Inc.*, No. 39659 (Ohio Ct. C.P. Feb. 4, 1983); *Quality Climate Controls, Inc. v. Borden, Inc.*, No. 80-CV-06-03407 (Ohio Ct. C.P. Nov. 5, 1982); *Shomber v. Borden, Inc.*, No. 80-CV-11-6086 (Ohio Ct. C.P. Nov. 5, 1982), *aff'd*, No. 82AP-1051 (Ohio Ct. App. Apr. 21, 1983); *Kegley v. Borden, Inc.*, No. 82-2-03317-5 (Wash. Super. Ct. Sept. 27, 1983); *Baker v. Washington Natural Gas*, No. 82-2-04261-7 (Wash. Super. Ct. Feb. 27, 1983); *Antoncich v. Borden, Inc.*, No. 81-2-00727-9 (Wash. Super. Ct. Feb. 19, 1982).

diethylstilbestrol,[4] the Dalkon Shield[5] and other allegedly defective products,[6] as well as in actions alleging harm to the environment.[7]

In particular, the Third Circuit's decision directly conflicts with the decision of the Ninth Circuit in *In re Northern District of California, "Dalkon Shield" IUD Products Liability Litigation*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171

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4. *Mertens v. Abbott Laboratories*, 99 F.R.D. 38 (D.N.H. 1983); *Payton v. Abbott Laboratories*, 100 F.R.D. 336 (D. Mass. 1983); *McElhaney v. Eli Lilly & Co.*, 93 F.R.D. 875 (D.S.D. 1982); *Mink v. University of Chicago*, 27 F.R.Serv.2d 739 (N.D. Ill. 1979); *Ryan v. Eli Lilly & Co.*, 84 F.R.D. 230 (D.S.C. 1979); *Morrissy v. Eli Lilly & Co.*, 76 Ill. App.3d 753, 394 N.E.2d 1369 (1979).

5. *In re Northern District of California, "Dalkon Shield" IUD Products Liability Litigation*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983); *Rosenfeld v. A.H. Robins Co.*, 63 A.D.2d 11, 407 N.Y.S.2d 196 (2d Dep't), *appeal dismissed*, 46 N.Y.2d 731, 385 N.E.2d 1301, 413 N.Y.S.2d 374 (1978).

6. *In re Tetracycline Cases*, 107 F.R.D. 719 (W.D. Mo. 1985) (tetracycline); *Feinstein v. Firestone Tire & Rubber Co.*, 535 F. Supp. 595 (S.D.N.Y. 1982) (tires); *Allshouse v. Firestone Tire & Rubber Co.*, No. 742-649 (Cal. Super. Ct. Aug. 18, 1981) (tires); *Rose v. Medtronics, Inc.*, 107 Cal. App.3d 150, 166 Cal. Rptr. 16 (1980) (heart pacemaker); *Wylder v. Proctor & Gamble Co.*, No. 16467/80 (N.Y. Sup. Ct. July 28, 1981) (tampons); *George v. Proctor & Gamble Co.*, No. 80-2919 (Ohio Ct. App. 1981); *Gilmore v. General Motors Corp.*, 35 Ohio Misc. 36, 300 N.E.2d 259 (Ohio Ct. C.P. 1973) (automobiles).

7. *Ruland v. General Electric Co.*, 94 F.R.D. 164 (D. Conn. 1982) (PCB's); *Boring v. Medusa Portland Cement Co.*, 63 F.R.D. 78 (M.D. Pa.), *appeal dismissed*, 505 F.2d 729 (3d Cir. 1974) (limestone dust emissions); *Reader v. Magma-Superior Copper Co.*, 110 Ariz. 115, 515 P.2d 860 (1973) (copper smelter emissions); *Markiewicz v. Salt River Valley Water Users' Ass'n*, 118 Ariz. 329, 576 P.2d 517 (1978) (flooding); *City of San Jose v. Superior Court of Santa Clara County*, 12 Cal.3d 447, 525 P.2d 701, 115 Cal. Rptr. 797 (1974) (air and noise pollution); *Harrell v. Hess Oil & Chemical Corp.*, 287 So.2d 291 (Fla. 1973) (water pollution); *Wojciechowski v. Republic Steel Corp.*, 67 A.D.2d 830, 413 N.Y.S.2d 70 (4th Dep't 1979) (dust pollution); *Askey v. Hooker Chemicals & Plastics Corp.*, Toxic Chemicals Litigation Rptr., June 20, 1983 at 213 (N.Y. Sup. Ct. 1980) (toxic waste); *Snyder v. Hooker Chemicals & Plastics Corp.*, 104 Misc.2d 735, 429 N.Y.S.2d 153 (N.Y. Sup. Ct. 1980) (toxic waste); *Mattoon v. City of Norman*, 633 P.2d 735 (Okla. 1981) (flooding); *RSR Corp. v. Hayes*, No. 05-83-01028 CV (Tex. Civ. App. Feb. 17, 1984) (lead smelter emissions); *Nolte v. Michels Pipeline Construction, Inc.*, 83 Wis.2d 171, 265 N.W.2d 482 (1978) (dewatering).

(1983). In the *Dalkon Shield* litigation, the Ninth Circuit reversed a district court's Rule 23(b)(3) certification of a state-wide class of plaintiffs who sought to recover damages allegedly resulting from the use of the Dalkon Shield. The Ninth Circuit concluded:

> [I]n products liability actions . . . individual issues may outnumber common issues. No single happening or accident occurs to cause similar types of physical harm or property damage. No one set of operative facts establishes liability. No single proximate cause applies equally to each potential class member and each defendant. Furthermore, the alleged tortfeasor's affirmative defenses (such as failure to follow directions, assumption of the risk, contributory negligence, and the statute of limitations) may depend on facts peculiar to each plaintiff's case.

693 F.2d at 853. The conflict between the decision of the Ninth Circuit in *Dalkon Shield* and that of the Third Circuit in this case warrants Supreme Court review and resolution.

In this regard, it is significant that the Judicial Panel on Multidistrict Litigation denied an attempt, under 28 U.S.C. §1407, to consolidate the federal school asbestos actions for pretrial purposes on the ground, *inter alia*, that "we are not persuaded that . . . common questions of fact will predominate over individual questions of fact present in each action." *In re Asbestos School Products Liability Litigation*, 606 F. Supp. 713, 714 (J.P.M.L. 1985).

The Third Circuit's radical departure from the overwhelming weight of legal precedent, unless reviewed and reversed by this Court, will have far-reaching effects on future class action litigation in the toxic tort and products liability area. Indeed, the Third Circuit opinion suggests that there is now a "trend . . . for courts to be more receptive to use of the class action in mass tort litigation." *School Asbestos Litigation, supra*, 789 F.2d at 1009. Because it represents a significant conflict with well-established legal authority, and may well become the seminal case in such a trend, the decision merits Supreme Court review.[8]

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8. The only other toxic tort/products liability class certification to be upheld by a United States Court of Appeals is *Jenkins v. Raymark Industries*,

The long history of decisions denying class certification in toxic tort and products liability actions finds support in the Advisory Committee Note to the 1966 Amendment to Rule 23(b)(3). The Advisory Committee cautioned:

> The court is required to find, as a condition of holding that a class action may be maintained under this subdivision, that the questions common to the class predominate over the questions affecting individual members. It is only where this predominance exists that economies can be achieved by means of the class-action device.
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> * * * *
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> A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.

Advisory Committee Note, 39 F.R.D. 69, 103 (1966). Courts have repeatedly relied upon the Advisory Committee's guidance in ruling that products liability and other toxic tort actions are inappropriate for class action treatment. *See, e.g., Dalkon Shield, supra*, 693 F.2d at 852; *Pearl v. Allied Corp.*, 102 F.R.D. 921, 923 (E.D. Pa. 1984); *Ryan v. Eli Lilly & Co.*, 84 F.R.D. 230, 231 (D.S.C. 1979); *Marchesi v. Eastern Airlines, Inc.*, 68 F.R.D. 500, 501 (E.D.N.Y. 1975); *Causey v. Pan American World Airways, Inc.*, 66 F.R.D. 392, 397 (E.D. Va. 1975); *Yandle v. PPG Industries, Inc.*, 65 F.R.D. 566, 569 (E.D. Tex. 1974); *Harrigan v. United States*, 63 F.R.D. 402, 407 (E.D. Pa. 1974).[9]

Inc., 782 F.2d 468 (5th Cir. 1986). *Jenkins*, however, involved claims subject only to Texas law, and the case was settled before the class certification issue could be presented to this Court for review.

9. This Court long ago stated that the Advisory Committee Notes are to be given weight in construing the Federal Rules of Civil Procedure. *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 444 (1946); *see also Maryland Casualty Co. v. Conner*, 382 F.2d 13, 16 (10th Cir. 1967); *United Press Ass'n*

The Third Circuit acknowledged the significance of the Advisory Committee Note's view of the impropriety of class certification in mass tort cases but suggested that "there is a growing acceptance of the notion that some mass accident situations may be good candidates for class action treatment" and that courts are "reassess[ing] . . . the utility of the class action in the mass tort area." *School Asbestos Litigation, supra*, 789 F.2d at 1008.[10] The Court of Appeals further suggested that this "reassessment . . . has come about, no doubt, because courts have realized that [a class proceeding] need not resolve all issues in the litigation. *See* Fed.R.Civ.P. 23(c)(4)(A)." *Id.*[11]

The Third Circuit's view of the benefits that might result from the use of Rule 23(c)(4)(A) stands in sharp contrast to the Ninth Circuit's discussion of this precise matter in *Dalkon Shield:*

> A trial court can sever and try only certain issues on a class basis under Rule 23(c)(4)(A). The few issues that might be tried on a class basis in this case, balanced against issues that must be tried individually, indicate that the time saved by a class action may be relatively insignificant. A few verdicts followed by settlements might be equally efficacious.

693 F.2d at 856.

Significantly, Rule 23(c)(4)(A) only permits an action to be maintained as a class action with respect to isolated issues "[w]hen appropriate." Courts have interpreted this important

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NOTES *(Continued)*

v. Charles, 245 F.2d 21, 31 (9th Cir.), *cert. denied*, 354 U.S. 925 (1957); *LaChapelle v. Owens-Illinois, Inc.*, 64 F.R.D. 96, 99 (N.D. Ga. 1974), *aff'd*, 513 F.2d 286 (5th Cir. 1975); 2 Moore's Federal Practice ¶1.13[2]. The Third Circuit failed to accord the Advisory Committee Note's long-standing construction of Rule 23(b)(3) the weight to which it is entitled.

10. The present actions, of course, are not "mass tort" actions, nor do they involve a "mass accident." The named plaintiffs' claims are based on numerous types of products of varying composition which were used for different purposes in various locations over a period of more than thirty years.

11. Rule 23(c)(4)(A) provides that "[w]hen appropriate . . . an action may be brought or maintained as a class action with respect to particular issues."

qualification to mean that class certification with respect to limited issues is permissible only when all the requirements of Rule 23 are otherwise satisfied. *See, e.g., Arthur Young & Company v. United States District Court*, 549 F.2d 686, 692 (9th Cir.), *cert. denied*, 434 U.S. 829 (1977); *Coca-Cola Bottling Co. v. Coca-Cola Co.*, 98 F.R.D. 254, 269 (D. Del. 1983). Accordingly, Rule 23(c)(4)(A) does not eliminate the necessity of subjecting plaintiffs' claims to the same rigorous Rule 23 analysis required in cases in which the entire action is certified as a class action.

Moreover, certification limited to specific issues is not appropriate if, as here, resolution of those issues will not advance the litigation. *See Mertens v. Abbott Laboratories*, 99 F.R.D. 38, 41 (D.N.H. 1983) ("[A] determination in principle would serve no useful purpose in resolving the individual claims made in this action. . . . Although common questions need not be dispositive of the entire action . . . their resolution should at least provide a definite signal of the beginning of the end" (citations omitted)). Because of the multitude of individual issues underlying the determination of liability and damages, resolution of any of the issues identified by the District Court will make no appreciable contribution towards establishing the causes of action alleged in the Complaints, and can only result in multiple trials before multiple juries and enormous prejudice to the defendants.

Thus, while the Ninth Circuit and the overwhelming majority of lower federal and state courts have denied or reversed class certification in products liability actions because of the necessity of individualized proof, the Third Circuit has now endorsed a radical departure from those precedents. Moreover, the Third Circuit has sanctioned this departure in a most inappropriate case involving products of different types and composition, which were put to different uses, installed in different locations and sold over a thirty-year period of time.

The Third Circuit's Rule 23(b)(3) decision involves important procedural questions as to the law governing class certification of toxic tort and products liability cases. In light of the decision's conflict with well-established judicial authority, including that of the Ninth Circuit, and its rejection of the view

expressed in the 1966 Advisory Committee Note, Supreme Court review is necessary.

II. THE THIRD CIRCUIT'S DECISION REQUIRES SUPREME COURT REVIEW BECAUSE A DISTRICT COURT'S DETERMINATION OF THE LEVEL AT WHICH AIRBORNE ASBESTOS FIBERS CONSTITUTE A HAZARD IN ALL SCHOOLS IN A FED. R. CIV. P. 23(b)(3) NATIONWIDE CLASS ACTION WOULD VIOLATE THE SEPARATION OF POWERS DOCTRINE AND ESTABLISHED PRINCIPLES OF FEDERALISM

The Third Circuit's decision, if not reviewed and reversed by this Court, will inevitably require the District Court in this case to depart from the accepted and usual course of judicial proceedings in a manner which violates the doctrine of separation of powers and established principles of federalism.

In approving the District Court's certification of a nationwide Rule 23(b)(3) class of school districts, the Third Circuit stated:

> Plaintiffs contend that the presence of any airborne asbestos fibers in a school presents an unacceptable hazard. Whether that is true or whether only a higher concentration creates a danger is an issue common to all members of the plaintiff class. *Ascertaining the danger point is critical to the determination of whether class members have sustained a legal injury and also is pertinent in establishing the existence of a defective product.*

School Asbestos Litigation, supra, 789 F.2d at 1009-10 (emphasis added). The Third Circuit, in effect, has sanctioned the judicial establishment, on a nationwide level, of standards governing the use of products both in this case and in all toxic tort and products liability cases that can be brought to the courts as purported class actions. Such decisions are more properly within the province of the executive and legislative branches of the government. *Cf.*

Bowsher v. Synar, 54 U.S.L.W. 5064 (U.S. July 7, 1986) (invalidating the assignment of certain executive branch functions to a legislative official in violation of the constitutional separation of powers doctrine).

A national class action is not the proper forum to "ascertain the danger point" of low-level exposure to airborne asbestos fibers. The establishment of a threshold at which airborne asbestos fibers are deemed to pose a hazard currently is being considered by the Congress, state legislatures and a number of state and federal agencies. In June of this year, subcommittees in both the U.S. Senate and the House of Representatives approved the Asbestos School Hazard Emergency Response Act of 1986, which would require the EPA for the first time to set rules and standards for proper removal or abatement of asbestos in schools. *See* H.B. 5073 and S. 2083.

In upholding the District Court's Rule 23(b)(3) certification of a nationwide class of school districts, the Third Circuit has approved a massive adversary judicial proceeding to determine matters which have been — and remain — under active consideration by the legislative and executive branches of the government. However, as this Court stated in *INS v. Chada*, 462 U.S. 919 (1983), "[t]he hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." *Id.* at 951. Because a federal district court, sitting in diversity, and a class action jury cannot decide these questions on a nationwide scale without usurping the functions of the other two branches of government, Supreme Court review is warranted.

Moreover, the Third Circuit's approval of a nationwide class action to determine a national standard of "safe" exposure to airborne asbestos fibers violates well-settled principles of federalism under which the various states are free to develop competing solutions to complex problems, allowing those which work well to be adopted by others as a model.

Long ago, Justice Brandeis stated:

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may

> be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). This well-established principle of federalism is as applicable to the unresolved social, economic and scientific issues of today as it was in the era in which Justice Brandeis wrote. *See, e.g., Valentine v. Smith*, 654 F.2d 503, 509 (8th Cir.) ("Until we know more about the long term effects of affirmative action, we are reluctant to discourage states from acting voluntarily to remedy past racial discrimination"), *cert. denied*, 454 U.S. 1124 (1981); *McMorris v. Israel*, 643 F.2d 458, 463 (7th Cir. 1981), *cert. denied*, 455 U.S. 967 (1982) (court declined to consider challenge to Wisconsin law's determination that a pre-test stipulation between the district attorney and the defendant permitting the use of a polygraph test enhances the reliability of the test).

The Third Circuit's decision warrants Supreme Court review because it in effect deprives the states of the right to devise their own varying solutions to the problem of asbestos-containing products in the schools and impinges on the functions of the other two branches of government.

III. THE THIRD CIRCUIT'S DECISION REQUIRES SUPREME COURT REVIEW BECAUSE IT FAILED TO ANALYZE THE ELEMENTS OF PLAINTIFFS' CLAIMS AND THE PROOF THEY PROPOSE TO OFFER TO ESTABLISH THOSE CLAIMS

In determining whether any common questions would predominate over individual questions in these actions, neither the Third Circuit nor the District Court analyzed the legal elements of plaintiffs' various claims or focused on the proof they propose to offer to establish those claims. This Rule 23(b)(3) analysis has been employed by other circuits, and the Third Circuit's failure

to subject plaintiffs' claims to such an examination puts its decision in conflict with the decisions of those circuits.

One of the elements of the named plaintiffs' tort claims (strict liability, intentional tort and negligence) in these actions is proof of the existence of an unreasonable hazard or of a defective product unreasonably dangerous to others.[12] In this regard, the named plaintiff school districts claim that class certification is proper because it is unnecessary for them to prove the existence of an unreasonable hazard in each school. They have asserted, as their "theory of liability," that the "mere presence" of asbestos-containing products in school buildings creates an unreasonable risk which, when combined with the school's expenditures for testing, inspection and abatement, establishes liability on the part of the defendants.[13]

The District Court recognized that the named plaintiffs' Complaints allege six claims: negligence, strict liability in tort, breach of warranty, intentional tort, concert of action and civil conspiracy. However, rather than identify the various elements of proof for each of these claims and examine the type of proof plaintiffs intend to offer (*i.e.*, proof of the "mere presence") to establish the claims, the District Court lumped all six claims together, identified four issues it believed to be at the "core" of all six claims[14] and based its analysis on the generalization that

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12. As explained in Section IV, *infra*, however, the standard of liability, and the types of evidence relevant thereto, vary significantly throughout the jurisdictions.

13. A number of courts, however, have held that proof of the "mere presence" of an allegedly defective product is *not* sufficient to establish liability. *See Cleveland Board of Education v. Armstrong World Industries, Inc.*, 22 Ohio Misc. 2d 18, 476 N.E.2d 397, 404 (Ohio Ct. C.P. 1985) (asbestos-containing products in Ohio schools); *Brummett v. Skyline Corp.*, No. C 81-0103-L(B), slip op. at 20-21 (W.D. Ky. June 3, 1985) (formaldehyde); *Kuhn v. Skyline Corp.*, No. 83-0942, slip op. at 7 (M.D. Pa. Aug. 3, 1984) (formaldehyde).

14. The four issues identified by the District Court are: (1) the general health hazards of asbestos; (2) defendants' knowledge or reason to know of the health hazards of asbestos; (3) defendants' failure to warn/test; and (4) defendants' concert of action and/or conspiracy involving formation of and adherence to industry practices.

plaintiffs were going to seek to prove a "tort." *See Asbestos School Litigation, supra,* 104 F.R.D. at 431-32.

Likewise, the Third Circuit accepted the named plaintiffs' simplistic "theory of liability" without analysis and found a predominance of common questions on the basis of the four issues the District Court found sufficient to satisfy Rule 23(a)(2)'s commonality requirement and its view of the types of evidence presented in asbestos personal injury litigation. *School Asbestos Litigation, supra,* 789 F.2d at 1009-10.

This Court has recognized, however, that "the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.' " *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 469 (1978), *quoting Mercantile National Bank v. Langdeau,* 371 U.S. 555, 558 (1963). The proper Rule 23(b)(3) predominance analysis, therefore, requires a rigorous analysis of these factual and legal issues.

Although consideration of the merits of a plaintiff's claim is not appropriate in determining the propriety of class certification, *see Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 177 (1974); *Kahan v. Rosenstiel,* 424 F.2d 161, 169 (3d Cir.), *cert. denied sub nom. Glen Alden Corp. v. Kahan,* 398 U.S. 950 (1970), a number of circuits require a far more stringent Rule 23(b)(3) examination of the plaintiff's claims than that applied by the Third Circuit in this case. The Fifth, Ninth and Eleventh Circuits have recognized that Rule 23(b)(3)'s predominance standard requires an analysis of the legal elements of the plaintiff's claims and the proof offered to establish the elements of those claims.

In *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation,* 691 F.2d 1335 (9th Cir. 1982), *cert. denied sub nom. California v. Standard Oil Co.,* 464 U.S. 1068 (1984), for example, the Ninth Circuit affirmed the denial of class certification in an antitrust price-fixing action after finding that the named plaintiffs had failed to set forth any acceptable method of proving on a class-wide basis that their claims fit within an exception to the indirect purchaser rule of *Illinois Brick v. Illinois,* 431 U.S. 720 (1977). In explaining its decision, the Ninth Circuit stated that, although the district court had to

take the substantive allegations in the plaintiffs' Complaint as true, it was nevertheless "required to consider the nature and range of proof necessary to establish those allegations." 691 F.2d at 1342. The Ninth Circuit concluded that "any theory on which [plaintiffs] might rely would raise predominantly individual questions" and that plaintiffs' proposed class-wide evidence would be insufficient to prove their claims. 691 F.2d at 1342-43.

This type of Rule 23(b)(3) analysis has been applied by the Eleventh Circuit in *Nelson v. United States Steel Corp.*, 709 F.2d 675, 679 (11th Cir. 1983), and by the Fifth Circuit in *Nichols v. Mobil Board of Realtors, Inc.*, 675 F.2d 671, 676 (5th Cir. 1982) ("no showing was made . . . as to how the class representatives would demonstrate impact by means of generalized proof"). *See also Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir. 1975) (district court properly considered, *inter alia*, the nature and range of proof necessary to establish plaintiffs' allegations), *cert. denied*, 429 U.S. 816 (1976); *cf. Stastny v. Southern Bell Telephone and Telegraph Company*, 628 F.2d 267, 274 (4th Cir. 1980) (discussing the "intertwining" of the class action inquiry with the merits inquiry).

The determination of whether factual or legal issues are common, and would predominate in the litigation, requires an examination of (1) the individual legal elements of the claims that the named plaintiffs must prove to establish a *prima facie* case; (2) the proof necessary to establish each element; and (3) whether such proof may be presented on a common basis. Both the Third Circuit and the District Court failed to analyze the named plaintiffs' "theory of liability" to determine whether the evidence proposed by the plaintiffs, even if capable of being presented on a class-wide basis, would establish any of their claims.

The litigants in the present case differ sharply over the proof that is necessary to establish the claims alleged in the Complaints. The named plaintiffs' simplistic "theory of liability" is aimed more at passing muster under Rule 23 than at establishing the legal elements of any of their claims. Defendants assert that the mere physical presence of an asbestos-containing product does not necessarily result in the release of any asbestos fibers or

pose any hazard. Whether a particular product in a building releases fibers in such a quantity as to present a hazard is an individual question which must be determined on a building-by-building basis.[15]

This type of dispute over the appropriate manner of proof will arise in all types of toxic tort and products liability litigation. These important questions are at the core of Rule 23(b)(3)'s requirement that common issues must predominate over individual issues.

Instead of focusing on the elements of plaintiffs' claims and the proof necessary to establish their claims, the Third Circuit limited its Rule 23(b)(3) predominance analysis principally to the comment that class certification would advance the resolution of class members' claims and, indeed, might foster settlement by eliminating the presentation of redundant evidence. *See School Asbestos Litigation, supra*, 789 F.2d at 1010.

Moreover, its decision to uphold the Rule 23(b)(3) class certification was expressly based, in part, on its view that "[m]ost tort cases settle." *Id.* at 1009. The Third Circuit explained:

> Concentration of individual damage suits in one forum can lead to formidable problems but the realities of litigation should not be overlooked in theoretical musings. Most tort cases settle, and the preliminary maneuverings in litigation today are designed as much, if not more, for settlement purposes than for trial.

Id.

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15. Proof of the existence of a hazard posed by a particular product in any particular building will depend on numerous individual factors such as (a) how much asbestos is contained in the product; (b) the type of asbestos contained in the product; (c) how the asbestos fibers are formulated in or bound to the other component elements in the product; (d) whether the asbestos in the product is friable; (e) the likelihood that the asbestos in the product can or will be released into the ambient air; (f) how the product was originally installed; (g) where the product was installed; (h) how long the product has been in place; (i) what maintenance and repair procedures have been performed on the product since installation; (j) whether the product has been subjected to on-site deterioration as a result of climatic conditions; and (k) whether the product has been subjected to on-site abuse or improper maintenance or repair.

These considerations have *no* place in Rule 23 analysis and greatly prejudice the rights of individual defendants to a fair hearing on the issues raised in the named plaintiffs' Complaints. As the Seventh Circuit stated in another context, the Federal Rules of Civil Procedure are to be construed "to effectuate the general purpose of seeing that cases are tried on the merits . . . ." *Staren v. American National Bank & Trust Company of Chicago*, 529 F.2d 1257, 1263 (7th Cir. 1976). Although settlement is often a laudable goal, it may not be sought through the misuse of a procedural device which becomes so onerous and prejudicial to the defendants that they cannot litigate the case and have no choice but to settle. Fairness may not be sacrificed in the pursuit of efficiency.

As a result of its failure to subject the named plaintiffs' claims and proposed proof to the type of rigorous analysis required under Rule 23(b)(3), the Third Circuit has rendered a decision in conflict with those of other federal circuits on an important question of federal procedural law. Furthermore, the Third Circuit's almost cavalier rationale for class certification, unless firmly rejected by this Court, will surely invite the filing of nationwide class actions in factually dissimilar toxic tort and products liability cases. It represents an improper lowering of the Rule 23 standards for class certification in tort cases and an implicit encouragement of the use of Rule 23 class certification in an attempt to coerce settlements.[16]

The questions of whether the requirements of Rule 23 may be relaxed in tort cases simply because such cases often settle

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16. The Third Circuit also expressed its view that its "reluctance to vacate the (b)(3) certification is influenced by the highly unusual nature of asbestos litigation." *School Asbestos Litigation*, *supra*, 789 F.2d at 1011. Rule 23, however, makes *no* exception for asbestos litigation, and the prerequisites for class certification cannot be relaxed because of the "unusual nature of asbestos litigation." Indeed, this Court's recent decision in *Celotex Corporation v. Catrett*, 54 U.S.L.W. 4775 (U.S. June 25, 1986), in which the Court construed the requisite standards for summary judgment under Rule 56, demonstrates that the procedural requirements of the Federal Rules of Civil Procedure are to be strictly followed in all cases, including asbestos cases.

and, indeed, whether Rule 23 class certification may be used to compel settlements call for the exercise of this Court's power of supervision and are worthy of review.

IV. THE THIRD CIRCUIT'S DECISION REQUIRES SUPREME COURT REVIEW BECAUSE A NATIONWIDE CLASS ACTION CANNOT SATISFY FED. R. CIV. P. 23(b)(3)'S SUPERIORITY REQUIREMENT AND FAIRLY AND EFFICIENTLY ADJUDICATE ALLEGED TOXIC TORT AND PRODUCTS LIABILITY CLAIMS WHICH ARE SUBJECT TO THE VARYING LAWS OF OVER FIFTY JURISDICTIONS

Rule 23(b)(3) requires a determination "that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." A consideration pertinent to the necessary finding of superiority is "the difficulties likely to be encountered in the management of a class action." In the present case, however, the necessity of applying the varying products liability laws of over fifty jurisdictions to plaintiffs' claims will make a fair and efficient adjudication of those claims impossible and prevent this class action from being a superior method of proceeding.

This Court has held that "the constitutional limitations [on choice of law] must be respected even in a nationwide class action." *Phillips Petroleum Co. v. Shutts*, 105 S.Ct. 2965, 2981 (1985). In *Shutts*, this Court ruled that a Kansas state court could not apply Kansas law to the claims of all class members in a nationwide class of investors when the majority of the class members had no apparent connection to Kansas. The interaction of the *Shutts* decision and Rule 23(b)(3)'s superiority requirement raises important questions of federal procedural law for claims governed by state substantive law and, as such, merits Supreme Court review.

The Third Circuit recognized the necessity of applying the laws of the various jurisdictions to the individual school districts' claims in these diversity actions. *See School Asbestos Litigation*,

supra, 789 F.2d at 1010. Indeed, the Third Circuit acknowledged that it had "misgivings on manageability" and that it harbored "some doubt" as to whether the obstacle of applying the varying state laws could be overcome. *Id.* at 998, 1010. Nevertheless, the Third Circuit deferred to the District Court's view that any difficulties could be resolved through the creation of sub-classes and noted that the named plaintiffs had represented to the District Court that they would "direct their discovery and trial briefs to meet the most stringent test of liability." *Id.* at 1000, 1010-11.[17]

The Third Circuit did not fully analyze the enormous manageability problems created by what this Court in *Shutts* declared to be a constitutional necessity. Instead, the Third Circuit tacitly approved the named plaintiffs' promise to direct their case to meet "the most stringent test of liability" and their simplistic argument that there are only a few variations in the states' substantive laws, which could be accommodated through the use of sub-classes. This crucial constitutional problem cannot, however, be resolved through sub-classes, and the "most stringent test" solution is impossible in the many situations in which the substantive products liability laws of the various jurisdictions are diametrically opposed. More importantly, acceptance of the "most stringent test" is directly contrary to this Court's decision in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), which prohibits federal courts sitting in diversity from devising any type of federal common law to resolve the matters before them.

Substantive differences and conflicts in the states' laws will arise at *every* procedural stage of the litigation. First, the sufficiency of plaintiffs' Complaints will have to be decided under the

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17. An additional consideration worthy of this Court's review is the question of whether the named plaintiffs' promise to accept the "most stringent test" makes them inappropriate class representatives of the many individual school districts whose claims, under their own state law, are subject to lesser standards of proof. *See East Texas Motor Freight v. Rodriguez*, 431 U.S. 395, 403-5 (1977).

laws of the various jurisdictions.[18] Second, whatever claims survive Rule 12(b)(6) motions to dismiss will then be subject to Rule 56 motions for summary judgment. Under Rule 56, the District Court must determine if there are genuine issues as to any material facts. A factual issue that is material to a school district's claim under one state's law, however, may be completely immaterial under another state's law.

An analysis of the laws of over fifty jurisdictions will again be required when motions in limine are filed, when evidentiary questions are raised and when jury instructions are formulated. Indeed, the trial will resemble a political convention. Cautionary instructions will be required each time evidence is offered that is relevant under the laws of one jurisdiction but irrelevant under the laws of another. Any verdict would resemble a roll call vote because the liability of each defendant will have to be decided under the law of each applicable jurisdiction.

The variations in some states' laws governing just one of the named plaintiffs' six claims, strict liability in tort, highlight the onerous, if not impossible, task facing a court in attempting to apply the appropriate law at each stage of the class litigation.

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18. Motions to dismiss complaints have been filed in individual asbestos-in-schools cases in various states across the country and, predictably, have met with different results based on the different state laws. In Illinois and Alabama, courts have dismissed the complaints in their entirety. *See Board of Education v. ACandS, Inc.*, No. 85 CH 00811 (Cir. Ct. Cook County, Ill. Feb. 26, 1986); *Franklin County School Board v. Lake Asbestos of Quebec, Ltd.*, No. 84-AR-5435-NW (N.D. Ala. Feb. 13, 1986). In New Hampshire, claims of negligence and strict liability have been permitted, but nuisance, fraud, conspiracy, contract, restitution and indemnity claims have been dismissed. *See University System of New Hampshire v. National Gypsum Co.*, No. 84-716-1 (D.N.H. July 22, 1985). In New York, claims of negligence, strict liability, restitution and indemnity have been permitted, but nuisance, fraud, conspiracy and contract have been dismissed. *See City of New York v. Keene Corp.*, No. 44559/84 (N.Y. Sup. Ct. July 9, 1986); *City of New York v. Keene Corp.*, No. 44559/84 (N.Y. Sup. Ct. Nov. 19, 1985). In South Carolina, claims of fraud and negligence were permitted, but the strict liability claim was dismissed. *See Greenville County School District v. United States Gypsum Co. and Spartanburg County School District v. National Gypsum Co.*, Nos. 82-3142-14 and 83-1744-14 (D.S.C. July 29, 1985).

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At the outset, a number of states have declined to recognize the doctrine of strict liability for claims arising out of allegedly defective products. Georgia, Michigan and Virginia are three such states.[19]

Other states have adopted strict liability by enacting statutes which have been held not to apply retroactively. In South Carolina, for example, a cause of action in strict liability does not exist where the allegedly defective product entered the stream of commerce prior to 1974.[20] *See Schall v. Sturm, Ruger Co.*, 278 S.C. 646, 300 S.E.2d 735 (1983).

Among jurisdictions that recognize strict liability, some states narrowly restrict its application. North Carolina, for example, permits a cause of action in strict liability only in cases involving dangerous instrumentalities such as explosives,[21] while Delaware has refused to apply the strict liability doctrine to the commercial sales of goods.[22]

Many jurisdictions have adopted the doctrine of strict liability defined in §402A of the Restatement (Second) of Torts, which applies to claims involving products that are sold "in a defective condition unreasonably dangerous." Nevertheless, state law *application* of the Restatement formulation is very different and conflicting.

As a threshold matter, states do not agree on the proper test for determining whether a product is "in a defective condition unreasonably dangerous." For example, in making this determination, Kansas applies a consumer expectation test (*i.e.*, the product must be dangerous to an extent beyond that which

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19. *See Talley v. City Tank Corp.*, 158 Ga.App. 130, 279 S.E.2d 264 (1981); *Prentis v. Yale Mfg. Co.*, 421 Mich. 670, 365 N.W.2d 176 (1984); *Goodbar v. Whitehead Bros.*, 591 F. Supp. 532 (W.D. Va. 1984) (applying Virginia law), *aff'd sub nom. Beale v. Hardy*, 769 F.2d 213 (4th Cir. 1985).

20. The EPA banned the spraying of friable materials containing more than one percent asbestos for use as insulation or fireproofing materials in 1973. *See* 38 Fed. Reg. 8826 (1973).

21. *See Maybank v. S.S. Kresge Co.*, 46 N.C. App. 687, 266 S.E.2d 409 (1980), *aff'd*, 302 N.C. 129, 273 S.E.2d 681 (1981).

22. *See Cline v. Prowler Industries of Maryland, Inc.*, 418 A.2d 968 (Del. 1980).

would be contemplated by the ordinary consumer).[23] Kentucky, on the other hand, holds that jury instructions applying a consumer expectation test constitute reversible error; the proper test in that jurisdiction is whether an ordinarily prudent manufacturer, being fully aware of the risk, would not have put the product on the market.[24] Oregon essentially equates the above two tests,[25] while Texas rejects jury instructions containing either test, favoring instead a third test that weighs the risks associated with the product against its utility.[26] Ohio also endorses the risk/utility test, but only when the consumer expectation test is deemed inappropriate.[27]

Still other jurisdictions have abandoned the requirement of §402A that the product be "unreasonably dangerous" on the ground that such language improperly "rings of negligence."[28] Thus, it is reversible error in Pennsylvania to use the language "unreasonably dangerous" in jury instructions,[29] while in Colorado and Iowa the doctrine of strict liability requires a jury finding that the product was "unreasonably dangerous."[30] Washington's product liability statute has been interpreted as requiring a negligence test of liability in failure to warn and de-

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23. *See Lester v. Magic Chef, Inc.*, 230 Kan. 643, 641 P.2d 353 (1982).

24. *See Nicholas v. Union Underwear Co.*, 602 S.W.2d 429 (Ky. 1980).

25. *See Phillips v. Kimwood Machine Co.*, 269 Or. 485, 525 P.2d 1033 (1974).

26. *See Turner v. General Motors Corp.*, 584 S.W.2d 844 (Tex. 1979).

27. *See Sours v. General Motors Corp.*, 717 F.2d 1511 (6th Cir. 1983) (applying Ohio law).

28. *See, e.g., Butaud v. Suburban Marine & Sporting Goods, Inc.*, 543 P.2d 209 (Alaska 1975), *modified*, 555 P.2d 42 (Alaska 1976); *Cronin v. J.B.E. Olson Corp.*, 8 Cal.3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972); *Azzarello v. Black Bros. Co.*, 480 Pa. 547, 391 A.2d 1020 (1978); *cf. Morningstar v. Black & Decker Mfg. Co.*, 162 W. Va. 857, 253 S.E.2d 666 (1979) (rejecting "unreasonably dangerous" standard in favor of "not reasonably safe" standard).

29. *See Azzarello v. Black Bros. Co.*, 480 Pa. 547, 391 A.2d 1020 (1978); *Mattocks v. Daylin, Inc.*, 611 F.2d 30 (3d Cir. 1979) (applying Pennsylvania law).

30. *See Potthoff v. Alms*, 41 Colo. App. 51, 583 P.2d 309 (1978); *Eickelberg v. Deere & Co.*, 276 N.W.2d 442 (Iowa 1979).

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sign defect cases,[31] while Alaska holds it reversible error to include negligence concepts in jury instructions in a design defect case,[32] and Kansas precludes such concepts in jury instructions in a failure to warn case.[33]

Even more profound differences exist among the states' laws with respect to the elements of a *prima facie* case of strict liability and the allocation of the burden of proof. In California, the plaintiff may meet his burden with evidence of use of the product, circumstances of the injury, and features of the product relevant to an evaluation of its safety.[34] Oregon, however, requires that a plaintiff also adduce evidence that a safer, technologically feasible and practicable alternative design was commercially available at the time the product was manufactured.[35] On the other hand, Arkansas and New Jersey hold that a plaintiff need not prove the existence of a safer, alternative design.[36]

Among states employing a risk/utility analysis, New Jersey, Ohio and Oregon place the burden of proving that the risks outweigh the benefits of the product on the plaintiff.[37] California holds the opposite, placing the burden on the defendant to prove that the benefits of the product design outweigh its risks.[38]

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31. *See Connor v. Skagit Corp.*, 30 Wash. App. 725, 638 P.2d 115 (1981), *aff'd*, 99 Wash.2d 709, 664 P.2d 1208 (1983).

32. *See Heritage v. Pioneer Brokerage & Sales, Inc.*, 604 P.2d 1059 (Alaska 1979).

33. *See Prentice v. Acme Machine & Supply Co.*, 226 Kan. 406, 601 P.2d 1093 (1979).

34. *See Campbell v. General Motors Corp.*, 32 Cal.3d 112, 649 P.2d 224, 184 Cal. Rptr. 891 (1982).

35. *See Appel v. Standex International Corp.*, 62 Or. App. 208, 660 P.2d 686, *pet. denied*, 295 Or. 446, 668 P.2d 382 (1983).

36. *See French v. Grove Mfg. Co.*, 656 F.2d 295 (8th Cir. 1981) (applying Arkansas law but requiring plaintiff to prove that the challenged product had dangers other than those present in all similar products); *O'Brien v. Muskin Corp.*, 94 N.J. 169, 463 A.2d 298 (1983).

37. *See O'Brien v. Mushkin*, 94 N.J. 169, 463 A.2d 298 (1983); *Cremeans v. International Harvester Co.*, 6 Ohio St.3d 232, 452 N.E.2d 1281 (1983); *Wilson v. Piper Aircraft Corp.*, 282 Or. 411, 579 P.2d 1287 (1978).

38. *See Barker v. Lull Engineering Co.*, 20 Cal.3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

Although the above survey of the variations in the states' laws governing a plaintiff's case is necessarily under-inclusive and by no means exhaustive, it nevertheless demonstrates the insurmountable problems in managing the class litigation of the named plaintiffs' claims. The problem is further compounded by the differences in state laws governing the defenses that are available to a cause of action such as strict liability.

Many jurisdictions, for example, consider product misuse an affirmative defense,[39] while others require the plaintiff to prove an absence of misuse or reasonably foreseeable use.[40] In addition, there is no consensus as to the availability and effect of various contractual defenses in strict liability cases. Idaho recognizes a disclaimer in a sales contract as a defense to a strict liability claim.[41] Similarly, Oregon recognizes a limitation of remedy clause as barring an action in strict liability.[42] Oklahoma, on the other hand, holds that a disclaimer in a sales contract will not bar a strict liability claim against the manufacturer.[43]

There is an even greater disparity concerning the admissibility and effect of evidence offered to prove that a challenged product complied with industry custom or standards or that it was within the state of the art at the time of manufacture.

Arizona and Indiana, for example, have enacted statutes providing that conformity with the state of the art is an absolute defense.[44] Under the law of Colorado and Kentucky, however,

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39. *See, e.g., Brown v. Sears, Roebuck & Co.*, 136 Ariz. 556, 667 P.2d 750 (Ariz. Ct. App. 1983); *Hoffman v. E.W. Bliss Co.*, 448 N.E.2d 277 (Ind. 1983); *Stewart v. Scott-Kitz Miller Co.*, 626 P.2d 329 (Okla. Ct. App. 1981).

40. *See, e.g., Schwartz v. American Honda Motor Co.*, 710 F.2d 378 (7th Cir. 1983) (applying Illinois law); *Venezia v. Miller Brewing Co.*, 626 F.2d 188 (1st Cir. 1980) (applying Massachusetts law); *Hughes v. Magic Chef, Inc.*, 288 N.W.2d 542 (Iowa 1980).

41. *See Idaho Power Co. v. Westinghouse Electric Corp.*, 596 F.2d 924 (9th Cir. 1979) (applying Idaho law).

42. *See Atlas Mutual Insurance Co. v. Moore Dry Kiln Co.*, 38 Or. App. 111, 589 P.2d 1134 (1979).

43. *See Sterner Aero AB v. Page Airmotive, Inc.*, 499 F.2d 709 (10th Cir. 1974) (applying Oklahoma law).

44. *See* Ariz. Rev. Stat. Ann. §12-683; Ind. Code Ann. §33-1-1.5-4(b)(4).

compliance with the state of the art raises a rebuttable presumption that the product was not defective.[45] Missouri treats state of the art evidence as relevant in a failure to warn case,[46] while New Jersey holds that such evidence is irrelevant in a failure to warn case.[47]

Kentucky's statute creates a rebuttable presumption that the product is not defective if it conforms to industry standards, even if those standards do not themselves conform to the state of the art at the time of design and manufacture.[48] By contrast, Ohio views compliance with industry customs as merely one, non-dispositive factor to be considered by the trier of fact.[49] Kansas, on the other hand, holds that evidence of industry standards is irrelevant to the issue of defect.[50]

Under §402A, evidence that an allegedly defective product was substantially altered after the sale will constitute a defense to a strict liability action. States, however, have interpreted this "substantial alteration" defense differently. Pennsylvania allows the defense only when the jury finds that the alteration was not "reasonably foreseeable."[51] New York, on the other hand, holds a manufacturer not liable where a third party consciously bypasses a built-in safety feature, even if such alteration was foreseeable.[52]

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45. *See* Colo. Rev. Stat. §13-21-403(1)(a); Ky. Rev. Stat. §411.310(2).

46. *See Tretter v. Johns-Manville Corp.*, 88 F.R.D. 329 (E.D. Mo. 1980) (applying Missouri law).

47. *See Beshada v. Johns-Manville Products Corp.*, 90 N.J. 191, 447 A.2d 539 (1982).

48. *See International Harvester Co. v. Riffe*, No. 82-CA-403-MR (Ky. Ct. App. June 3, 1983).

49. *See Sours v. General Motors Corp.*, 717 F.2d 1511 (6th Cir. 1983) (applying Ohio law).

50. *See Rexrode v. American Laundry Press Co.*, 674 F.2d 826 (10th Cir.), *cert. denied*, 459 U.S. 862 (1982) (applying Kansas law).

51. *See Merriweather v. E.W. Bliss Co.*, 636 F.2d 42 (3d Cir. 1980) (applying Pennsylvania law).

52. *See Robinson v. Reed-Prentice Div. of Package Machinery Co.*, 49 N.Y.2d 471, 403 N.E.2d 440, 426 N.Y.S.2d 717 (1980).

An additional consideration is that, as a federal court sitting in diversity, the District Court will be required, under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) and its progeny, to *predict* what many of the states' highest courts would decide on questions of first impression. One example of this situation is the necessity of determining the legal viability of the "mere presence" theory of liability under each state's law. Another example is the question of whether "enterprise" or "market share" liability may be imposed on defendants in cases where the plaintiffs cannot identify the specific manufacturer of the product allegedly producing the claimed damage. Some states have adopted such theories in certain circumstances.[53] Other states have refused to apply these theories.[54] Many others have not yet decided the question. In the present case, the District Court will be required to predict which, if any, such theory the particular state's highest court would choose.[55] The enormity of the task is manifest, and the potential for error is undeniable.

The Third Circuit pointed to the view of one commentator who wrote:

> [T]here will be a point at which the sheer magnitude of the task of construing the various laws will compel a court not to certify the multi-state class or to reduce it to a more manageable number of states. Even short of that point, choice of law may pose major problems. The first is the danger of an unwarranted intrusion into another state's legal affairs

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53. *See Goldman v. Johns-Manville Corp.*, No. L-85-016 (Ohio Ct. App., Lucas Co. June 30, 1986); *Sindell v. Abbott Laboratories*, 26 Cal.3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, (1980), *cert. denied*, 449 U.S. 912 (1980); *Hall v. E.I. DuPont de Nemours & Co.*, 345 F. Supp. 353 (E.D.N.Y. 1972); *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334 (5th Cir. 1982).

54. *See, e.g., Ryan v. Eli Lilly & Co.*, 514 F. Supp. 1004 (D.S.C. 1981); *Namm v. Charles E. Frosst and Co.*, 178 N.J. Super. 19, 427 A.2d 1121 (1981); *Gray v. United States*, 445 F. Supp. 337 (S.D. Tex. 1978); *cf. Abel v. Eli Lilly & Co.*, 94 Mich. App. 59, 289 N.W.2d 20 (1979) (permitting a limited shifting of proof to the defendant), *modified*, 418 Mich. 311, 343 N.W.2d 164, *cert. denied*, 105 S.Ct. 123 (1984).

55. The *Sindell* or "market share" type liability theory has never been applied and is totally inappropriate to litigation in which the product is identifiable and not fungible.

> through a mistaken application of its laws. The court should thus consider its own familiarity with the other state's law, the degree to which that law is unclear or unsettled, and the extent to which it implicates important interests of the other state.

Note, *Multistate Plaintiff Class Actions: Jurisdiction and Certification*, 92 Harv. L. Rev. 718, 742 (1979), quoted in *School Asbestos Litigation, supra*, 789 F.2d at 1010 n.11.

Having recognized the necessity of applying the various laws of over fifty jurisdictions and having identified certain of the management problems associated with that task, the Third Circuit erred in permitting these actions to go forward as a class action. Because of the importance of this issue to the future litigation of the present case and to future multi-state products liability actions, this Court should grant certiorari and prevent the District Court's unwarranted intrusion upon the products liability laws of the various jurisdictions in this case.

CONCLUSION

For the reasons set forth above, petitioners request that a Writ of Certiorari issue to review the judgment of the Third Circuit affirming the District Court's Rule 23(b)(3) class certification decision.

Respectfully submitted,

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APPENDIX TO
PETITION FOR WRIT OF CERTICRARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

RULE 28.1 STATEMENTS

Pursuant to Rule 28.1 of the Rules of the Supreme Court, the petitioners herein make the following statements disclosing parents, non-wholly owned subsidiaries and affiliates:

The Celotex Corporation:
Jim Walter Corporation and Carey Canada Inc.

Carey Canada Inc.:
Jim Walter Corporation and The Celotex Corporation.

GAF Corporation:
None.

Asbestos Corporation, Ltd.:
None.

Bell Asbestos Mines, Ltd.:
None.

Owens-Corning Fiberglas Corporation:
Arabian Fiber Glass Insulation Company (indirectly owned); Norsk Glassfiber A/S (indirectly owned); Oregon Metallurgical Corporation; Verac Technology A/S.

The Flintkote Company:
Genstar Corporation; Genstar Pacific Corporation.

Fibreboard Corporation:
Louisiana Pacific Corporation

Lac D'Amiante du Quebec, Ltee. (formerly known as Lake Asbestos of Quebec, Ltd.):
ASARCO, Incorporated

Rule 23(a) of the Federal Rules of Civil Procedure provides:

> (a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Rule 23(b)(3) of the Federal Rules of Civil Procedure provides:

> (b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> * * *
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 84-1642, 84-1643, 84-1649, 84-1651, 84-1652, 84-1670, 84-1671, 84-1672, 84-1692, 84-1693, 84-1694, 84-1695, 84-1696, 85-1243, 85-1272, 85-1287 & 85-1288

IN RE: SCHOOL ASBESTOS LITIGATION

SCHOOL DISTRICT OF LANCASTER,
MANHEIM TOWNSHIP SCHOOL DISTRICT,
LAMPETER-STRASBURG SCHOOL DISTRICT,
and
NORTHEASTERN SCHOOL DISTRICT

v.

LAKE ASBESTOS OF QUEBEC, LTD., THE CELOTEX CORP., RAYMARK INDUSTRIES, INC., UNION CARBIDE CORP., ASBESTOSPRAY CORP., SPRAYO-FLAKE CO., NATIONAL GYPSUM CO., SPRAYED INSULATION, INC., ASBESTOS FIBRES, INC., DANA CORP., U.S. GYPSUM, U.S. MINERAL PRODUCTS CO., SPRAYON INSULATION & ACOUSTICS, INC., SPRAYON RESEARCH CORP., KEENE CORP., WORBEN CO., INC., WILKIN INSULATION CO., W.R. GRACE & CO., OWENS-CORNING FIBERGLAS CORP., STANDARD INSULATIONS, INC., NORTH AMERICAN ASBESTOS CORP., CASSIAR RESOURCES LTD., BELL ASBESTOS MINES, LTD., ASBESTOS CORPORATION LIMITED, SOUTHERN TEXTILE CORP., OWENS-ILLINOIS, INC., TURNER & NEWALL LTD., THE FLINTKOTE CO., FIBREBOARD CORP., GAF CORP., UNIROYAL, INC., CAPE ASBESTOS, PFIZER, INC., KAISER CEMENT CORP., BES-TEX, INC., GEORGIA-PACIFIC CORP.
(D.C. Civil No. 83-0268)

BARNWELL SCHOOL DISTRICT NO. 45

v.

U.S. GYPSUM, NATIONAL GYPSUM CO., W.R. GRACE & CO., ASBESTOSPRAY CORP., SPRAYO-FLAKE CO., SPRAYED INSULATION, INC., ASBESTOS FIBRES, INC., DANA CORP., U.S. MINERAL PRODUCTS CO., SPRAYON INSULATION & ACOUSTICS, INC., SPRAYON RESEARCH CORP., KEENE CORP., WILKIN INSULATION CO., TURNER & NEWALL LTD., J.W. ROBERTS, LTD., PROKO INDUSTRIES, INC., RAYMARK INDUSTRIES, INC., OWENS-CORNING FIBERGLAS CORP., STANDARD INSULATIONS, INC., SOUTHERN TEXTILE CORP., OWENS-ILLINOIS, INC., THE FLINTKOTE CO., FIBREBOARD CORP., UNIROYAL, INC., ROCK WOOL MANUFACTURING CO., INC., EMPIRE ACE INSULATION MANUFACTURING CORP., EAGLE-PICHER INDUSTRIES, INC., FORTY-EIGHT INSULATIONS, INC., COMBUSTION ENGINEERING, INC., GAF CORP., LAC D'AMIANTE DU QUEBEC, LTEE., THE CELOTEX CORP., CAREY-CANADA, INC., UNION CARBIDE CORP., BRINCO MINING, LTD., formerly known as CASSIAR RESOURCES, LTD., BELL ASBESTOS MINES, LTD., ASBESTOS CORPORATION LIMITED, CAPE ASBESTOS, NORTH AMERICAN ASBESTOS CORP., TURNER ASBESTOS FIBRES, LTD., C. TENNANT & SONS, HUXLEY DEVELOPMENT CORP., ASTEN GROUP, INC., H.K. PORTER CO., NICOLET INDUSTRIES, ARMSTRONG CONTRACTING & SUPPLY CORP., BENJAMIN FOSTER CO., PITTSBURGH CORNING CORP., ARMSTRONG WORLD INDUSTRIES, INC., WORBEN CO., INC.

(D.C. Civil No. 83-1395)

APPEAL OF GAF CORP., APPELLANT IN 84-1642, 85-2372 & 85-1288

APPEAL OF LOS ANGELES UNIFIED SCHOOL DISTRICT, APPELLANT IN 84-1642

APPEAL OF FIBREBOARD CORP., APPELLANT IN 84-1649

APPEAL OF THE CELOTEX CORP. AND CAREY-CANADA, INC., APPELLANTS IN 84-1651 & 85-1243

APPEAL OF NATIONAL GYPSUM CO., U.S. GYPSUM CO., AND W.R. GRACE & CO., APPELLANTS IN 84-1652 & 85-1287

APPEAL OF BOARD OF EDUCATION OF CLIFTON, APPELLANT IN 84-1670

APPEAL OF LAC D'AMIANTE DU QUEBEC, LTEE., APPELLANT IN 84-1671

APPEAL OF OWENS-CORNING FIBERGLAS CORP., APPELLANT IN 84-1672

APPEAL OF BARNWELL SCHOOL DISTRICT NO. 45, APPELLANT IN 84-1692

APPEAL OF BELL ASBESTOS MINES, LTD. AND U.S. MINERAL PRODUCTS CO., APPELLANTS IN 84-1693

APPEAL OF ASBESTOS CORPORATION LIMITED, APPELLANT IN 84-1694

APPEAL OF BOARDS OF EDUCATION OF ANDERSON COUNTY, JOHNSON COUNTY, LOUDON COUNTY, KNOX COUNTY, CITY OF KNOXVILLE, AND HAWKINS COUNTY, TENNESSEE, APPELLANTS IN 84-1695

APPEAL OF H.K. PORTER CO., SOUTHERN TEXTILE CORP., AND FORTY-EIGHT INSULATIONS, INC., APPELLANTS IN 84-1696

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Argued January 6, 1986

Before: WEIS, HIGGINBOTHAM, and BECKER,
Circuit Judges

Decided May 1, 1986
As Amended May 30, 1986

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OPINION OF THE COURT

WEIS, *Circuit Judge*.

In an effort to reach an equitable result in these asbestos property damage cases brought by school authorities, the district court certified a nationwide mandatory class for punitive damages and an opt-out class for compensatory damages. We conclude that the mandatory class cannot be approved because of a lack of necessary findings and for the additional reason that the class, being under-inclusive, cannot in the circumstances here accomplish the objectives for which it was created. We will, however, affirm the denial of a (b)(2) class and despite misgivings on manageability, will affirm the district court's

conditional certification of a Rule 23(b)(3) opt-out class on compensatory damages.

The district court invoked Fed.R.Civ.P. 23(b)(1)(B) in entering the certification order designating a mandatory class for school districts seeking punitive damages and followed Rule 23(b)(3) in forming a class for those seeking compensatory damages. A request for class certification under Rule 23(b)(2) was denied.

Pursuant to 28 U.S.C. § 1292(b), the court certified that the order constituting the 23(b)(1)(B) class raised a controlling question of law respecting possible violation of the Anti-Injunction Act, 28 U.S.C. § 2283. Various parties have appealed, challenging not only that phase of the case but also the propriety of the (b)(3) certification as well as the denial of the (b)(2) request.[1]

This litigation began with the filing of class action complaints in the Eastern District of Pennsylvania by several Pennsylvania school districts and the Barnwell, South Carolina School District. The cases were consolidated soon after filing. Defendants, numbering approximately fifty, are associated with the asbestos industry as miners, bulk suppliers, brokers, assemblers, manufacturers, distributors, and at least one contractor.

As a result of federal legislation and regulation, plaintiffs are required to test for the presence of asbestos in schools.[2] The complaints seek compensatory and punitive damages as well as injunctive relief stemming from compliance with the federal legislation

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1. Three school districts have filed related appeals challenging injunctions issued to enforce the mandatory class.

2. See The Toxic Substance Control Act, 15 U.S.C. §2605 and E.P.A. regulations at 40 C.F.R. §763.78 *et seq.* For other legislative responses to asbestos in the schools, see 20 U.S.C. §3601 *et seq.*; 20 U.S.C. §4011 *et seq.*

and the alleged need to remove or treat materials containing asbestos. The claims are based on theories of negligence, strict liability, intentional tort, breach of warranty, concert of action, and civil conspiracy.

After a group of plaintiffs presented a motion for the formation of classes under sections (b)(1) and (b)(2) of Rule 23, the court issued an order certifying such classes but limited them to claims against three defendants which had agreed not to oppose that action. This ruling led to objections by various other plaintiffs and defendants, and the court later vacated the order in part. Arguments were then heard from all parties who split, not along the usual plaintiff-defendant lines, but into a number of unusual alignments as dictated by their perceived interests. The eventual certification order included the claims against all defendants.

In conditionally creating a mandatory class under (b)(1)(B) on the punitive damage claims, the court found "a substantial possibility that early awards of punitive damages in individual cases [would] impair or impede the ability of future claimants to obtain punitive damages." *In re Asbestos School Litigation*, 104 F.R.D. 422, 437 (E.D. Pa. 1984). Although plaintiffs had advanced the argument that the defendants' funds would be exhausted before all claimants were paid, no substantive evidence was presented demonstrating that those assets would be insufficient, and accordingly the district judge declined to address that issue. *Id.* at 434 n.15.

The court believed that a mandatory class would create an opportunity for parity of treatment by bringing all injured parties into the same forum. Nevertheless, any plaintiff who opted out of the (b)(3) class would be permitted to settle a punitive damage claim with defendants. Additional support for

certification was found in the strong "federal interest inherent in asbestos abatement" and the minimal intrusion on the interests of the school districts.

Class certification under 23(b)(2), however, was denied. The court commented that "despite the ingenuity of plaintiffs' claims for limited equitable remedies, this case remains at bottom, one for legal damages." 104 F.R.D. at 438. Although recognizing the possibility that at some point there might be "an incidental need for equitable relief," the court concluded that such a potential could not sustain certification under 23(b)(2).

The court directed the certification of a 23(b)(3) class, finding the numerosity requirement satisfied by estimates that friable asbestos is present in approximately 14,000 of the nation's schools, about 8,500 of which have an abatement problem. Commonality existed in an underlying core of issues identified as:

> "(a) The general health hazards of asbestos;
>
> (b) defendants' knowledge or reason to know of the health hazards of asbestos;
>
> (c) defendants' failure to warn/test; and
>
> (d) defendants' concert of action and/or conspiracy involving formation of and adherence to industry practices."

104 F.R.D. at 429. Those elements could "be established by common proof, which, although it may be complex, does not vary from class-member school to class-member school."

The typicality requirement was satisfied because the plaintiffs' theories of liability were harmonious, and the named plaintiffs stood in a position similar to other members of the class. Some of the parties had

obliquely questioned the adequacy of representation, but the court concluded that the class was represented by counsel "very experienced with class action litigation and thoroughly familiar with property damage and mass disaster litigation."

In considering the specific requirements for a (b)(3) certification, the court noted that the presence of asbestos in school buildings had a similar impact on each member of the class. Additionally, the question of proximate cause was a legal one which could be resolved on a class-wide basis without involving individualized member-by-member proof.

Addressing the requirement of superiority, the court emphasized that in resolving "at least some of the issues" on a class basis potential savings in expense would result, a consideration particularly important in asbestos litigation with its staggering costs. Moreover, because all claims were for property damage, the level of concern for the plaintiffs' right to choose individual forums and counsel was reduced.

The district judge conceded that the manageability aspect was not "wholly without difficulty," but stated "at this point I believe the management problems can be overcome." The court was convinced that although the substantive tort law of many jurisdictions might be applicable, the basic variations could be reduced to a reasonable number and subclasses could be created to accommodate those differences. Furthermore, plaintiffs represented to the trial judge that they would "direct discovery and trial briefs to meet the most stringent test of liability."

Notwithstanding the difficulties, the court determined that the class action was superior to the only existing alternative -- repetitious individual litigation.

I.

This appeal must be decided against the background of the asbestos scene, an unparalleled situation in American tort law. To date, more than 30,000 personal injury claims have been filed against asbestos manufacturers and producers. An estimated 180,000 additional claims of this type will be on court dockets by the year 2010. Added to those monumental figures are the claims for property damage -- the cost of removing or treating asbestos-based materials used in building construction. Some indication of the magnitude of that potential liability may be gleaned from the fact that the property damage claims filed in the Johns-Manville bankruptcy proceedings stood at $69 billion as of June 1985.

The procedures of the traditional tort system proved effective in unearthing the hazards of asbestos to workers and the failure of its producers to reduce the risk. However, the undeniable limitations of the "one-on-one" approach in coping with the massive onset of claims now in the courts have caused serious and justified concern.

A report compiled by the Rand Corporation, entitled *Asbestos in the Court* (1985), paints a gloomy picture. It points out the high cost and inefficiencies in handling these individual claims as well as the uneven, inconsistent, and unjust results often achieved. Perhaps the least flattering statistic is the high cost of processing these claims: "On the average, the total cost to plaintiffs and defendants of litigating a claim was considerably greater than the amount paid in compensation." Report at page 1.

Inefficiency results primarily from relitigation of the same basic issues in case after case. Since a different jury is empaneled in each action, it must hear

the same evidence that was presented in previous trials. A clearer example of reinventing the wheel thousands of times is hard to imagine.

Apparent inconsistency of jury verdicts has often been a reflection of the ability of the system to sort out individual differences and tailor redress to precise circumstances. In the asbestos litigation field, however, the variation in jury awards has led to complaints that injustice rather than careful apportionment has resulted.

A Philadelphia Common Pleas Judge is quoted in the Rand Report:

> "Results of jury verdicts are capricious and uncertain. Sick people and people who died a terrible death from asbestos are being turned away from the courts, while people with minimal injuries who may never suffer severe asbestos disease are being awarded hundreds of thousands of dollars, and even in excess of a million dollars. The asbestos litigation often resembles the casinos 60 miles east of Philadelphia, more than a courtroom procedure."[3]

The problems are complicated by the variations and permutations of state law that govern tort liability. Most jurisdictions have continued, perhaps understandably, to treat the problem in a parochial and nearsighted manner. It may be that a state court

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3. As an illustration, the same judge wrote about two cases in which each plaintiff had similar illnesses and symptoms: "In the case involving the man who most counsel thought to be the sicker of the two, the jury awarded $15,000. For the other plaintiff, the jury awarded $1,200,000. These results made this litigation more like roulette than jurisprudence." Rand Report at 42.

does not wish to deny its litigants the benefits that are available in other jurisdictions. An attempt by a single state to impose some equitable form of apportionment to claims presently pending and to those inevitably arising in the future is discouraged because other jurisdictions are not required to adopt a similarly enlightened viewpoint. A forum wishing to take the long-range view might find that its efforts were not only ineffective but unfair to its citizenry because claimants in the other states could drain off all the assets available for satisfaction of claims.

The national dimensions of the problem have led to calls for congressional action. Although the subject has attracted the attention of individual representatives and senators, no legislative response has garnered enough support to be enacted. Frustrated by the seemingly intractable problems inherent in the present situation, a thoughtful minority of the Court of Appeals of the Fifth Circuit would have certified to the United States Supreme Court the question of whether federal common law can apply to asbestos litigation. *See Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314 (5th Cir. 1985) (in banc), *on rehearing*, 781 F.2d 394 (5th Cir. 1986) (The original in banc majority certified certain questions to the state supreme court, which declined to rule on them).

Although necessarily brief, this sketch of the background of asbestos litigation is enough to show that this is not a routine class action.

II.

Our first issue is appellate jurisdiction over the various questions presented. We have articulated a policy against freely accepting appeals from class certification orders where the action is grounded in the discretionary power of the district court. *Link v.*

Mercedes-Benz, Inc., 550 F.2d 860, 862 (3d Cir. 1977). To qualify for interlocutory review, a class certification decision must implicate special factors that take it outside the general rule. *Kramer v. Scientific Control Corp.*, 534 F.2d 1085, 1087 (3d Cir. 1976); *Katz v. Carte Blanche Corp.*, 496 F.2d 747 (3d Cir.), *cert. denied*, 419 U.S. 885 (1974).

We have no doubt that the question submitted under § 1292(b), focusing on the applicability of the Anti-Injunction Act to the mandatory class action under Rule 23(b)(1)(B), presents such an exception. Review of that issue also necessarily calls into consideration the propriety of class certification *vel non*.[4]

The power under § 1292(b) to review the district court's decisions on the Rule 23(b)(2) and (b)(3) matters is not as clearly defined. In *Murphy v. Heppenstall Co.*, 635 F.2d 233, 235 n.1 (3d Cir. 1980), we said, "On a Section 1292(b) appeal we consider all grounds which might require a reversal of the order appealed from." *See also Johnson v. Alldredge*, 448 F.2d 820 (3d Cir. 1973), *cert. denied sub nom. Conrath v. Johnson*, 419 U.S. 882 (1974).

Here the district judge incorporated all of his rulings on the three class action certification requests into one order. Even if that were not enough to give us appellate jurisdiction over the Rule 23(b)(2) and (b)(3) issues, we conclude that because so many of the factors relevant to the (b)(1)(B) class are also crucial to the (b)(2) and (b)(3) certifications, resolving some of

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4. Having found jurisdiction under § 1292(b), we need not discuss whether § 1292(a)(1) applies because of the injunctive orders issued in the related, consolidated cases. In any event, review under § 1292(a)(1) is more restrictive. Kershner v. Mazurkiewicz, 670 F.2d 440 (3d Cir. 1982); Tustin v. Heckler, 749 F.2d 1055, 1065 (3d Cir. 1984).

the questions now while reserving the others until after final judgment would be neither practicable nor desirable.[5]

Accordingly, we conclude that we have jurisdiction to consider all facets of the class certification order.

III.

THE 23(b)(1)(B) CERTIFICATION

All class actions must meet the prerequisites of Rule 23(a): numerosity, existence of questions of law or fact common to the class, typicality of claims or defenses, and adequacy of representation. Assuming the existence of these factors for present purposes, we proceed to the special elements of the (b)(1)(B) class, mindful that the most significant aspect of such a class is its mandatory character. All those who come within the description in the certification become, and must remain, members of the class because no opt-out provision exists.

In a diversity action such as this, certification of a mandatory class raises serious questions of personal jurisdiction and intrusion into the autonomous operation of state judicial systems. Another complicating factor is the Anti-Injunction Act, 28 U.S.C. § 2283, which prohibits a federal court from enjoining proceedings in a state court except with express Congressional authorization "or where necessary in aid of its jurisdiction or to protect or

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5. Counsel opposing interlocutory review admit that this court has the power to review the order *in toto* under our precedents. Nonetheless, they urge that we exercise discretion and confine our consideration to the precise legal question certified under § 1292(b). Although review in these peculiar circumstances should be broad, we intend in no way to diminish the stature of Link v. Mercedes-Benz, Inc., 550 F.2d 860 (3d Cir. 1977), as precedent in this court.

effectuate its judgment." By contrast, inclusion of the opt-out provision in 23(b)(3) class actions removes many of the problems raised by a mandatory procedure. Use of a voluntary class assures that only willing plaintiffs are before the court.

Rule 23(b)(1)(B) applies where there is a risk that "adjudications with respect to individual members of the class . . . would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests."

Because plaintiffs had presented no evidence that the defendants' available assets would be insufficient to pay all claims, the district court did not rely on a "limited fund" theory as a basis for class certification. The proponents of the mandatory class, however, asserted "the very real possibility" that late-coming plaintiffs would be unable to receive punitive damages if a court decided in the future that defendants had been punished enough. In short, at some point punitive damages might be prohibited because they would amount to overkill, a proposition advanced in *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967). Finding a "substantial possibility" of the overkill scenario, the district court determined that creation of a (b)(1)(B) class was warranted as a measure to promote "equality of treatment for all litigants."

The demands for punitive damages have propelled this action into the controversy over awarding exemplary damages in successive mass tort cases arising from the same wrongful act. Problems in this area have been created by the failure of some courts to recognize the reasons underlying punitive damages.

Exemplary damages are said to date back to the Code of Hammurabi of 2000 B.C. *See* Owen, *Problems*

in Assessing Punitive Damages Against Manufacturers of Defective Products, 49 U. Chi. L. Rev. 1, 10 (1982).[6] In a 1763 case, *Huckle v. Money*, 2 Will. K.B. 206, 95 Eng. Rep. 768, the court approved a punitive damage verdict where the the small size of the actual loss resulting from an illegal entry justified the jury verdict in excess of that amount. *See Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d at 836. Since then punitive awards have generally been available when the defendant's conduct was either intentional or so reckless as to be considered outrageous.

In this country, most jurisdictions have adopted the doctrine in one form or another. The Restatement (Second) of Torts § 908 and the majority of states endorse exemplary damages for punishment and deterrence. As such, these awards act almost as a form of criminal penalty administered in a civil court at the request of a plaintiff who serves somewhat as a private attorney general.

Consistent with this scheme, punitive damages form no part of the compensatory award--in theory the plaintiff's losses are fully redressed before consideration is given to exemplary damages.[7] Because

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6. Professor Owen published an article in 1976 generally approving punitive damages in the product liability context. Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. 1257 (1976). Concerned by sky-rocketing awards in cases that followed, some six years later he wrote on the necessity of curbing abuses and restricting the grounds of eligibility for such awards. *See* 49 U. Chi. L. Rev. 1 (1982). Since the publication of the second article, verdicts have increased dramatically both in size and frequency.

7. In four states, New Hampshire, Georgia, Michigan, and Connecticut, punitive damages have been allowed only to enhance the compensatory damages or to recover additional expenses, such as the cost of litigation. Ghiardi & Kircher, *Punitive Damages Law and Practice*, § 4.02 *et seq.* (1984).

the intent is to inflict punishment on a culpable defendant, in many jurisdictions insurance against such awards is contrary to public policy. *Compare Northwestern Nat'l. Cas. Co. v. McNulty*, 307 F.2d 432 (5th Cir. 1962), *with Lazenby v. Universal Underwriters Ins. Co.*, 383 S.W.2d 1 (Tenn. 1964). *See* Ghiardi & Kircher, *Punitive Damages Law & Practice*, § 6.11 (1984). *Cf.* Shaumaier & McKinsey, *The Insurability of Punitive Damages*, 72 A.B.A.J. 68 (1986).

In the era when most tort suits were "one-against-one" contests, a single act triggered a single punishment. The increasingly prevalent mass tort situation, however, exposes a defendant to repetitious punishment for the same culpable conduct. The parallels between the assessment of exemplary damages and a fine levied in criminal courts have led to suggestions that the concepts of double jeopardy and excessive punishment should be invoked in the civil field as well. *See Aetna Life Ins. Co. v. Lavoie*, 46 C.C.H. S.Ct. Bull. P. B1945 (Apr. 22, 1986); *see also* Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173 (1931); *cf.* Comment, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. Chi. L. Rev. 408 (1967).

Similar concerns have prompted highly respected judges to comment on the possibility that the due process clause might contain some constitutional limitation on the amount of exemplary damages to be awarded. "Unlimited multiple punishment for the same act determined in a succession of individual lawsuits and bearing no relation to the defendants' culpability or the actual injuries suffered by victims, would violate the sense of 'fundamental fairness' that is essential to constitutional due process." *In re Federal Skywalk Cases*, 680 F.2d 1175, 1188 (8th Cir. 1982)

(Heaney, J. dissenting). "There must, therefore, be some limit, either as a matter of policy or as a matter of due process, to the amount of times defendants may be punished for a single transaction." *In re "Agent Orange" Product Liability Litigation*, 100 F.R.D. 718, 728 (1983).

In addition to a possible federal constitutional limitation, state substantive tort law could place restraints on repetitive punitive damage awards. This concept, aimed at the prevention of "overkill" as discussed in *Roginsky*, has been labeled the "limited generosity" theory by some of the parties to this case.

In *Roginsky*, Judge Friendly speculated on the possibility of having one court assess a single punitive damage award for distribution to all successful plaintiffs. 378 F.2d at 839 n.11. *See also* Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 Fordham L. Rev. 37 (1983). The district court's (b)(1)(B) certification in this case is a variation on that same theme.

In a thoughtful dissertation prepared in the course of the LL.M. program for judges conducted at the University of Virginia Law School, Judge R. Barclay Surrick thoroughly reviewed the doctrine of punitive damages. He concluded that in the field of asbestos litigation, "[b]alancing the benefits to be derived from continued imposition of punitive damages against the social and economic consequences of such a course of action, it appears that the continued imposition of punitive damages cannot be justified." Surrick, *Punitive Damages and Asbestos Litigation in Pennsylvania: Punishment or Annihilation?*, 87 Dick. L. Rev. 265, 296 (1983).

Cognizant of these concerns, two federal courts of appeals have nevertheless allowed awards of punitive

damages in asbestos cases on the ground that they were permitted by state law. *Jackson v. Johns-Manville*, 781 F.2d 394 (5th Cir. 1986); *Cathey v. Johns-Manville Sales Corp.*, 776 F.2d 1565 (6th Cir. 1985). In the latter case, the court rejected the defendant's due process contention, stating that "As a matter of federal constitutional law we believe that the presence of a judicial tribunal before which to litigate the propriety of a punitive damages award provides Johns-Manville with all the procedural safeguards to which it is due." 776 F.2d at 1571.

Cathey treated the defendant's argument on punitive damages as raising only a procedural due process issue. But the concerns recited by a number of courts and commentators are centered on the substantive component of due process. *Cf. Daniels v. Williams*, 54 U.S.L.W. 4090, 4093 (Jan. 21, 1986) (Stevens, J., concurring) (Substantive due process "prohibits a State from taking certain action[s] 'regardless of the fairness of the procedures used to implement them.'").

Thus powerful arguments have been made that, as a matter of constitutional law or of substantive tort law, the courts shoulder some responsibility for preventing repeated awards of punitive damages for the same acts or series of acts. Preliminarily we will assume, without deciding, that these arguments might provide a threshold justification for the exercise of discretion in certifying a nationwide (mandatory) Rule 23(b)(1)(B) class for punitive damages. We nonetheless hold that the district court abused its discretion in certifying the 23(b)(1)(B) class here because neither the record nor the court's findings are adequate to support the procedure.

The district court made no factual findings at all as to the potential amount and scope of punitive

damages. This is in sharp contrast to the detailed findings on the subject in *In re Agent Orange Product Liability Litigation*, 100 F.R.D. 718 (E.D.N.Y. 1983), *mandamus denied*, 725 F.2d 858 (2d Cir.), *cert. denied*, 104 S.Ct. 1417 (1984). The most the district court mustered here was its conclusion that:

> It is apparent that there is a substantial possibility that early awards of punitive damages in individual cases will impair or impede the ability of future claimants to obtain punitive damages. The reality of such impairment has been recognized by commentators and courts. (citations omitted).

104 F.R.D. at 437.

We are aware of the inherent limitations on any factual inquiry undertaken at such an early stage of the litigation, and we recognize that any record that could be developed would be inevitably predictive. Nonetheless, in our view these findings fall short of the mark.

Moreover, some basic considerations expose a critical flaw in the district court's analysis. The class certified does not even include all property damage claimants. Claims for repair of municipal buildings, for instance, are omitted, as are those of homeowners. Within a few weeks after oral argument in this appeal, a jury awarded $6 million in a property damage case brought as a result of the presence of asbestos products in a city hall. Added to the recovery was $2 million in punitive damages. *City of Greenville v. W.R. Grace & Co.*, No. 6:85-1693-3 (D.S.C.).

There is some evidence that the school claims make up a significant portion of the total property damage alleged. *See Asbestos Litigation Reporter* at 10,243-44 (June 21, 1985). Clearly, however, this aspect of the litigation transcends the nation's

classrooms and extends to municipal buildings, homes, and other structures.

Far more significant are the tens of thousands of personal injury suits in which punitive damage verdicts have been and continue to be assessed. These claims are satisfied from the same pool of assets to which the school districts now look. If a limit is ever placed on the total punitive damages to be imposed on the asbestos defendants, then that limit probably would apply to all claims whether they arise in property damage or personal injury suits. The school claims would be but a small portion of this total.

The circumstances in this case are again a decided contrast to those in the "*Agent Orange*" litigation where all of the claims against the defendants were concentrated in one case. In that circumstance, the court had control over all those affected and could hope to carry out the basic premise justifying the class action -- parity for all victims and reduction of litigation expenses for all parties.

Assuming that the record supported the "limited generosity" theory, we would nonetheless decertify the class on the ground that it is under-inclusive. The "limited generosity" theory is a variation of the "limited fund" situation mentioned in the advisory committee note to Rule 23, the situation in which "claims are made by numerous persons against a fund insufficient to satisfy all claims." Fed. R. Civ. P. 23 advisory committee note. More precisely, "limited generosity" (or "punitive damages overkill," as some class members call it) is the functional equivalent of the limited fund in that, by operation of the limited generosity principle, only a limited amount of punitive damage funds will be available, regardless of the ability of the defendants to pay. Since the purpose of a 23(b)(1)(B) class is to avoid a judgment that "while not technically

concluding the other members, might do so as a practical matter," *id.*, all persons with claims upon the "limited fund" should be included in the 23(b)(1)(B) class.

Thus, because all awards must come from the same defendants, a mandatory class predicated on a potential legal limit to punitive damages would logically include all litigants who seek such awards. From that standpoint, the (b)(1)(B) class certified here is under-inclusive with the result that separate actions by those who should properly be included in the class will go forward. However, the suppression of such separate actions is described in the advisory committee note as "the [reason] for and the principal key to the propriety and value" of a 23(b)(1) class.

The committee notes further illuminate the problem of under-inclusiveness in this context by reference to Rule 19: "The considerations stated under clauses (A) and (B) are comparable to certain of the elements which define the persons whose joinder in an action is desirable as stated in Rule 19(a)." Rule 19 describes the procedure for "Joinder of Persons Needed for a Just Adjudication." Section (b) of that Rule provides that a suit should be dismissed when joinder of a party is impossible, and the court determines that "in equity and good conscience the action" should not continue.

The considerations mentioned in Rule 19 counsel against maintenance of this mandatory class action in the absence of the other punitive damage claimants.[8]

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8. The situation here is somewhat analogous to the problem presented by an interpleader action in which all claimants to the fund have not been made parties. *See* Metropolitan Life Ins. Co. v. Dumpson, 194 F. Supp. 9 (S.D.N.Y. 1961); *see also* Rapoport v. Banco Mexico Somex, 668 F.2d 667 (2d Cir. 1982).

The primary factor lies in the prejudice "to those already parties" to this action.

The effect of the mandatory class has been to single out the school districts for special and possibly disadvantageous treatment. They have been forced to litigate in a jurisdiction and under a class procedure that many districts do not desire, and their punitive damage claims have been put "on hold" while the protracted class certification procedure runs its course.[9] Because of this delay, this class could end up in a detrimental position if punitive damage awards are precluded because of a future judicial ruling.

Since the thousands of other claimants who seek exemplary damages from the asbestos defendants need not operate within the confines of a mandatory class procedure, the quest for punitive damages remains for them a race to the courthouse door. Consequently, if the district court proves correct in its theory that at some point a limit on all punitive damage awards will be established, the school districts may be prejudiced in their opportunity to share in the available funds in the meantime.

As noted by the district court, Rule 23(b)(1)(B) exists to protect potential claimants and provide equality of treatment. Certification of a punitive damage class under that provision here will not accomplish these objectives. In the court's pursuit of an end that is not attainable, the class designed to be protected will be burdened with hardships not imposed on any other litigants.

Nor do we see how, in the present posture of this litigation, the class could be expanded to confront

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9. It was conceded by counsel at oral argument that resolution of the class members' punitive damage claims would be delayed pending resolution of the compensatory damage (class) claims, a likely delay of several years.

effectively the punitive damage issue in the entire asbestos area. Whether a national class based on a federal constitutional challenge could accomplish that result is obviously not before us. Although we recognize and commend the district judge's attempt to grapple with the seemingly insoluble problems of punitive damages in these cases, we simply cannot find that the avenue he selected will lead to an appropriate and fair resolution.

We do not hold that under-inclusiveness is necessarily fatal to a class created under 23(b)(1)(B);[10] rather, each case requires a careful assessment of the factors mentioned in Rule 19. Courts should give particular attention to the possibility of prejudice either to those omitted from the class or to those within it. In the circumstances here, we conclude that under-inclusiveness does pose an obstacle.

A certain inherent prejudice exists when a litigant is forced to participate in an undesired mandatory class action. That result may be acceptable where the class device will serve the worthwhile goal of protecting the interests of all litigants to a potentially limited fund, but is hard to justify where only a small number of potential claimants can be included in the mandatory action.

A class action may promote efficiency by reducing repetitive testimony and evidence that otherwise would be required in individual trials. Those advantages, however, are secured at the price of delaying the disposition of individual cases that might be tried to conclusion in a number of state and district courts in the interim. In effect, a mandatory class action creates

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10. We obviously do not reach the question whether the notion of under-inclusiveness applies outside of a 23(b)(1)(B) mandatory class action.

a bottleneck by concentrating the litigation, at least for a period, before one judge instead of spreading the individual cases out among many trial forums.

The "limited generosity" theory poses yet another concern. Because that concept is based on state law, the lack of uniformity creates difficulties in this diversity case. Federal courts are bound by the constraints of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1948), and the dictates of state law may not be buried under the vast expanse of a federal class action. The parties' rights under state substantive law must be respected, and if that is not possible in a class action, then that procedure may not be used.

It follows that if we cannot make a reasonable prediction that state courts will uniformly accept the limited generosity theory, a class may not be certified with that concept as its underlying justification.

No state has yet held that the goals of punishment and deterrence have been met in asbestos cases, nor has the availability of further punitive damages been significantly restricted. As noted earlier, parochial considerations would tend to discourage individual states from eliminating punitive damages in the absence of similar rulings by the others. Nor even if such a movement gets under way is it likely that most states would implement the concept within a reasonably contemporaneous period.

Nothing in the record supports the expectation that a substantial number of states will adopt the limited generosity theory in the foreseeable life of this class action. We are aware of the growing sentiment to have state legislatures revise existing tort law. But despite strong arguments favoring limitations on punitive damages and the increasing number of bankruptcies, the "business as usual" attitude still prevails. *See, e.g., Jackson v. Johns-Manville; Cathey*

v. Johns-Manville; *Moran v. Johns-Manville Corp.*, 691 F.2d 811 (6th Cir. 1982); *Martin v. Johns-Manville Corp.*, 469 A.2d 655, (Pa. Super. 1983); *Johns-Manville Sales Corp. v. Janssens*, 463 So.2d 242 (Fla. App. 1984), *petition for review denied*, 467 So.2d 999 (Fla. 1985). A mandatory class should not be certified on the basis of a prospect so questionable at this time. The record before us is simply inadequate to support a (b)(1)(B) certification on a limited generosity theory.

Opponents of the mandatory class have also argued that its use here would be inconsistent with the due process considerations discussed in *Phillips Petroleum Co. v. Shutts*, 53 U.S.L.W. 4879 (June 25, 1985), and would violate 28 U.S.C. § 2283. *See In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir. 1982). Our resolution makes consideration of those issues unnecessary. Following the lead of the courts in *In Re Bendectin Products Liability Litigation*, 749 F.2d 300, 306 (6th Cir. 1984), and *Dalkon Shield IUD Products Liability Litigation*, 693 F.2d 847, 852 (9th Cir. 1982), we hold open the possibility of a 23(b)(1)(B) punitive damage class in more appropriate circumstances.

IV.

DENIAL OF 23(b)(2) CERTIFICATION

A class may be certified under 23(b)(2) when the "party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Plaintiffs here seek mandatory injunctive relief in the form of certain remedial action and restitution for expenditures already incurred to ameliorate asbestos hazards.

The district court concluded that despite the plaintiffs' ingenuity the claims in this suit were essentially for damages. The judge pointed to the advisory committee notes accompanying Rule 23(b)(2), which state that it "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages." The district court did not rule out the possible application of equitable remedies at some stage of the proceeding but concluded that a (b)(2) certification was not appropriate at this time.

Precedent supports the district court's view that an action for money damages may not be maintained as a Rule 23(b)(2) class action. *See, e.g., Lukenas v. Bryce's Mountain Resort, Inc.*, 538 F.2d 594 (4th Cir. 1976); *In re Arthur Treacher's Franchise Litigation*, 93 F.R.D. 590, 594 (E.D. Pa. 1982). We see no justification for overturning the district judge's evaluation of the realities of the litigation before him. Counsel's desire to have a mandatory class is understandable, but the case for such a certification has not been established.

We find neither error of law nor abuse of discretion in the judge's ruling, and consequently will affirm the denial of a (b)(2) class.

V.

THE 23(b)(3) CERTIFICATION

The advisory committee notes to (b)(3) state that a "mass accident" causing injuries to numerous persons is generally not appropriate for class action treatment because "significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways." If such an action were conducted as a class action, it "would degenerate in practice into multiple lawsuits separately tried."

Although that statement continues to be repeated in case law, there is growing acceptance of the notion that some mass accident situations may be good candidates for class action treatment. An airplane crash, for instance, would present the same liability questions for each passenger, although the damages would depend on individual circumstances. Determination of the liability issues in one suit may represent a substantial savings in time and resources. Even if the action thereafter "degenerates" into a series of individual damage suits, the result nevertheless works an improvement over the situation in which the same separate suits require adjudication on liability using the same evidence over and over again. *See Hernandez v. Motor Vessel Skyward*, 61 F.R.D. 558 (S.D. Fla. 1973).

Reassessment of the utility of the class action in the mass tort area has come about, no doubt, because courts have realized that such an action need not resolve all issues in the litigation. *See* Fed.R.Civ.P. 23(c)(4)(A). If economies can be achieved by use of the class device, then its application must be given serious and sympathetic consideration.

Concentration of individual damage suits in one forum can lead to formidable problems, but the realities of litigation should not be overlooked in theoretical musings. Most tort cases settle, and the preliminary maneuverings in litigation today are designed as much, if not more, for settlement purposes than for trial. Settlements of class actions often result in savings for all concerned.

Part of the reluctance to apply the class action to mass torts is rooted in the notion that individual plaintiffs have the right to select their own counsel and forum, particularly in personal injury actions. *See Dalkon Shield IUD Products Liability Litigation*, 693 F.2d 847 (9th Cir. 1982); *Yandle v. PPG Indus., Inc.*,

65 F.R.D. 566 (E.D. Tex. 1974). That factor has little, if any, relevance in this case because the claims are limited to property damage, and school districts are unlikely to have strong emotional ties to the litigation. *See In re Three Mile Island Litigation*, 87 F.R.D. 433 (M.D. Pa. 1980) (certifying class action as to economic claims but not for personal injuries). Furthermore, the school districts have the right to opt out, and some have stated their intention to do so.

In short, the trend has been for courts to be more receptive to use of the class action in mass tort litigation. *See* Wright & Colussi, *The Successful Use of the Class Action Device in the Management of the Skywalk Tort Litigation*, 52 U.M.K.C. L. Rev. 141 (1984); Williams, *Mass Tort Class Actions: Going, Going, Gone?* 98 F.R.D. 323; Wright & Miller, *Federal Practice and Procedure*, §1783; Note, *Class Certification in Mass Accident Cases Under Rule 23(b)(1)*, 96 Harv. L. Rev. 114 (1983).

In reviewing the district court's (b)(3) certification, we must decide whether the criteria of Rule 23(a) are met. The requirements of numerosity, typicality, and adequacy of representation were found to be satisfied in this case, and we affirm those determinations on the basis of the district court's analysis. The only serious challenge raised to the 23(a) ruling is the argument that no "questions of law or fact common to the class" exist. *See* Rule 23(a)(2). Addressing that contention, we examine the district court's identification of the common issues involved in the plaintiffs' claims. *Bogosian v. Gulf Oil Co.*, 561 F.2d 434 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978). If the district court applied the correct legal standard, its class action determination is subject to review for abuse of discretion. 561 F.2d at 448; *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 756-57 (3d Cir. 1974) (in banc).

Noting that the complaints allege claims for damages based on negligence, strict liability, breach of warranty, intentional tort, concert of action and civil conspiracy, the district court explained that all these claims "arise out of the same common nucleus of operative facts relating to defendants' conduct and the nature of asbestos products." 104 F.R.D. at 432.

The district judge identified common factual issues as the health hazards of asbestos, the defendants' knowledge of those dangers, the failure to warn or test, and the defendants' concert of action or conspiracy in the formation of and adherence to industry practices. The court also believed that the proof of these matters would not vary widely from one class member to another. While harboring some reservations as to the breadth of the district court's analysis, we agree with its determination that Rule 23(a)(2) is satisfied.

Plaintiffs aver that low-level exposure to asbestos constitutes an excessive risk of harm, and that the presence of ambient fibers requires expensive remedial action to comply with federal legislation and regulations. Plaintiffs contend that the presence of any airborne asbestos fibers in a school presents an unacceptable hazard. Whether that is true or whether only a higher concentration creates a danger is an issue common to all members of the plaintiff class. Ascertaining the danger point is critical to the determination of whether class members have sustained a legal injury and also is pertinent in establishing the existence of a defective product.

The plaintiffs' contention that defendants knew of the dangers of asbestos and failed to warn is also common to the mc. ibers of the class. The opponents assert that the defendants' knowledge cannot be proved on a common basis because medical

understanding of the effects of asbestos exposure has "changed markedly" over the years. The focus, however, must be on whether the fact to be proved is common to the members of the class, not whether it is common to all the defendants. *See Blackie v. Barrack*, 524 F.2d 891 (9th Cir. 1975).

Similarly, proof of concert of action or conspiracy by the defendants (or some of them) involves common questions.

We find ourselves in substantial agreement with the reasoning of the Court of Appeals for the Fifth Circuit which, in upholding a (b)(3) class action of 893 asbestos personal injury claims, noted that the "threshold of commonality is not high." *Jenkins v. Raymark Indus. Inc.*, 782 F.2d 468 (5th Cir. 1986).

Once the mandates of Rule 23(a) are satisfied, certification may be upheld when common issues predominate over individual ones and the class method of adjudication is superior to existing alternatives. There may be cases in which class resolution of one issue or a small group of them will so advance the litigation that they may fairly be said to predominate. Resolution of common issues need not guarantee a conclusive finding on liability. *Eisenberg v. Gagnon*, 766 F.2d 770 (3d Cir. 1985), nor is it a disqualification that damages must be assessed on an individual basis. *See Bogosian*, 561 F.2d at 456.

Experience shows that in the asbestos litigation arena redundant evidence is the rule rather than the exception. In case after case, the health issues, the question of injury causation, and the knowledge of the defendants are explored, often by the same witnesses. Efforts to achieve expeditious disposition of the cases by invocation of *stare decisis* and collateral estoppel have been largely unsuccessful. *See Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334 (5th Cir.

1982); *Migues v. Fibreboard Corp.*, 662 F.2d 1182 (5th Cir. 1982).

The use of the class action device appears to offer some hope of reducing the expenditure of time and money needed to resolve the common issues which are of substantial importance. As the *Jenkins* court commented, "It is difficult to imagine that class jury findings on the class questions will not significantly advance the resolution of the underlying hundreds of cases." 782 F.2d at 472-73.

In some ways, *Jenkins* presented more difficult problems because of the complexity of the causation questions in personal injury suits; that phase of a property damage claim is more straightforward. However, the *Jenkins* class action is confined to claims arising under the law of a single state. Here the court is confronted with the substantive law of many states.

To meet the problem of diversity in applicable state law, class plaintiffs have undertaken an extensive analysis of the variances in products liability among the jurisdictions. That review separates the law into four categories. Even assuming additional permutations and combinations, plaintiffs have made a creditable showing, which apparently satisfied the district court, that class certification does not present insuperable obstacles. Although we have some doubt on this score, the effort may nonetheless prove successful.[11]

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11. One commentator has written:

"there will be a point at which the sheer magnitude of the task of construing the various laws will compel a court not to certify the multistate class or to reduce it to a more manageable number of states. Even short of that point, choice of law may pose major problems. The first is the danger of an unwarranted intrusion into another state's legal affairs through a mistaken application of its laws. The

We have cited only a few illustrations and have not attempted to compile a complete listing of the practical problems in this case. Some of these difficulties have already been alluded to in the order of the multi-district panel refusing to consolidate pretrial activity in some twenty school district cases. *See In re Asbestos School Products Liability Litigation*, 606 F.Supp. 713 (J.P.M.L. 1985).

As we see it, at the present stage, manageability is a serious concern. In a sense, a whole industry is on trial, presenting a likelihood that defendants occupying various positions in the distribution chain could bear differing degrees of responsibility for the alleged injury to the class. For example, two of the common questions are the defendants' knowledge of the dangers of asbestos and the existence of an industry-wide conspiracy to suppress that knowledge. Although the plaintiffs' proof on those points would not differ from class member to class member, certain defendants may respond on an individual basis as to their lack of culpability. The potential for individualized defenses does not detract from the commonality of the questions as viewed from the standpoint of the class members, but the problem clearly poses significant case management concerns.

Manageability is a practical problem, one with which a district court generally has a greater degree of expertise and familiarity than does an appellate court. *Link v. Mercedes-Benz, Inc.*, 550 F.2d at 864. Hence, a district court must necessarily enjoy wide discretion,

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court should thus consider its own familiarity with the other state's law, the degree to which that law is unclear or unsettled, and the extent to which it implicates important interests of the other state."

Note, *Multistate Plaintiff Class Actions: Jurisdiction and Certification*, 92 Harv. L. Rev. 718, 742 (1979).

and we are not inclined to reverse a certification before the district judge has had an opportunity to put the matter to a test. We point out the critical fact that certification is conditional. When, and if, the district court is convinced that the litigation cannot be managed, decertification is proper. *See Payton v. Abbott Labs*, 100 F.R.D. 336 (D. Mass. 1983).

As the case goes forward, the district court may well find other important common issues, perhaps even more critical for resolution than those sorted out at this early stage. We are unwilling to foreclose that possibility. Nor do we limit the option of the district court to decertify if the issues it has classified as substantial later appear insufficient to justify the class procedure.

We acknowledge that our reluctance to vacate the (b)(3) certification is influenced by the highly unusual nature of asbestos litigation. The district court has demonstrated a willingness to attempt to cope with an unprecedented situation in a somewhat novel fashion, and we do not wish to foreclose an approach that might offer some possibility of improvement over the methods employed to date.

Accordingly, the order certifying a (b)(3) class will be affirmed as will the order denying a (b)(2) certification. The order granting a (b)(1)(B) class will be vacated.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 84-1642, 84-1643, 84-1649, 84-1651, 84-1652, 84-1670, 84-1671, 84-1672, 84-1692, 84-1693, 84-1694, 84-1695, 84-1696, 85-1243, 85-1272, 85-1287 & 85-1288*

IN RE: SCHOOL ASBESTOS LITIGATION

SCHOOL DISTRICT OF LANCASTER
MANHEIM TOWNSHIP SCHOOL DISTRICT
LAMPETER-STRASBURG SCHOOL DISTRICT
and
NORTHEASTERN SCHOOL DISTRICT

v.

LAKE ASBESTOS OF QUEBEC, LTD., THE CELOTEX CORP., RAYMARK INDUSTRIES, INC., UNION CARBIDE CORP., ASBESTOSPRAY CORP., SPRAYO-FLAKE CO., NATIONAL GYPSUM CO., SPRAYED INSULATION, INC., ASBESTOS FIBRES, INC., DANA CORP., U.S. GYPSUM, U.S. MINERAL PRODUCTS CO., SPRAYON INSULATION & ACOUSTICS, INC., SPRAYON RESEARCH CORP., KEENE CORP., WORBEN CO., INC., WILKIN INSULATION CO., W.R. GRACE & CO., OWENS-CORNING FIBERGLAS CORP., STANDARD INSULATIONS, INC., NORTH AMERICAN ASBESTOS CORP., CASSIAR RESOURCES LTD., BELL ASBESTOS MINES, LTD., ASBESTOS CORPORATION LIMITED, SOUTHERN TEXTILE CORP., OWENS-ILLINOIS, INC., TURNER & NEWALL LTD., THE FLINTKOTE CO., FIBREBOARD CORP., GAF CORP., UNIROYAL, INC., CAPE ASBESTOS, PFIZER, INC., KAISER CEMENT CORP., BES-TEX, INC., GEORGIA-PACIFIC CORP.
(D.C. Civil No. 83-0268)

BARNWELL SCHOOL DISTRICT NO. 45

v.

U.S GYPSUM, NATIONAL GYPSUM CO., W.R. GRACE & CO., ASBESTOSPRAY CORP., SPRAYO-FLAKE CO., SPRAYED INSULATION, INC., ASBESTOS FIBRES, INC., DANA CORP., U.S. MINERAL PRODUCTS CO., SPRAYON INSULATION & ACOUSTICS, INC., SPRAYON RESEARCH CORP., KEENE CORP., WILKIN INSULATION CO., TURNER & NEWALL LTD., J.W. ROBERTS, LTD., PROKO INDUSTRIES, INC., RAYMARK INDUSTRIES, INC., OWENS-CORNING FIBERGLAS CORP., STANDARD INSULATIONS, INC., SOUTHERN TEXTILE CORP., OWENS-ILLINOIS, INC., THE FLINTKOTE CO., FIBREBOARD CORP., UNIROYAL, INC., ROCK WOOL MANUFACTURING CO., INC., EMPIRE ACE INSULATION MANUFACTURING CORP., EAGLE-PICHER INDUSTRIES, INC., FORTY-EIGHT INSULATIONS, INC., COMBUSTION ENGINEERING, INC., GAF CORP., LAC D'AMIANTE DU QUEBEC, LTEE., THE CELOTEX CORP., CAREY-CANADA, INC., UNION CARBIDE CORP., BRINCO MINING, LTD., formerly known as CASSIAR RESOURCES, LTD., BELL ASBESTOS MINES, LTD., ASBESTOS CORPORATION LIMITED, CAPE ASBESTOS, NORTH AMERICAN ASBESTOS CORP., TURNER ASBESTOS FIBRES, LTD., C. TENNANT & SONS, HUXLEY DEVELOPMENT CORP., ASTEN GROUP, INC., H.K. PORTER CO., NICOLET INDUSTRIES, ARMSTRONG CONTRACTING & SUPPLY CORP., BENJAMIN FOSTER CO., PITTSBURGH CORNING CORP., ARMSTRONG WORLD INDUSTRIES, INC., WORBEN CO., INC.
(D.C. Civil No. 83-1395)

GAF CORP., APPELLANT IN 84-1642, 85-1272 & 85-1288

LOS ANGELES UNIFIED SCHOOL DISTRICT, APPELLANT IN 84-1643

FIBREBOARD CORP., APPELLANT IN 84-1649

THE CELOTEX CORP., AND CAREY-CANADA, INC., APPELLANTS IN 84-1651 & 85-124

NATIONAL GYPSUM CO., U. S. GYPSUM CO., AND W.R. GRACE & CO., APPELLANTS IN 84-1652 & 85-1287

BOARD OF EDUCATION OF CLIFTON, APPELLANT IN 84-1670

LAC D'AMIANTE DU QUEBEC, LTEE., APPELLANT IN 84-1671

OWENS-CORNING FIBERGLAS CORP., APPELLANT IN 84-1672

BARNWELL SCHOOL DISTRICT NO. 45, APPELLANT IN 84-1692

BELL ASBESTOS MINES, LTD. AND U. S. MINERAL PRODUCTS CO., APPELLANTS IN 84-1693

ASBESTOS CORPORATION LIMITED, APPELLANT IN 84-1694

BOARDS OF EDUCATION OF ANDERSON COUNTY, JOHNSON COUNTY, LOUDON COUNTY, KNOX COUNTY, CITY OF KNOXVILLE, AND HAWKINS COUNTY, TENNESSEE, APPELLANTS IN 84-1695

H.K. PORTER CO., SOUTHERN TEXTILE CORP., AND FORTY-EIGHT INSULATIONS, INC. APPELLANTS IN 84-1696

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: WEIS, HIGGINBOTHAM and BECKER, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel January 6, 1986.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered September 28, 1984, as amended by the order entered March 29, 1985, be, and the same is hereby affirmed insofar as it certified a (b)(3) class and denied a (b)(2) certification, and vacated insofar as it granted a (b)(1)(B) class. All of the above in accordance with the opinion of this Court.

ATTEST

/s/ Sally Mrvos
Clerk

May 1, 1986

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 84-1642, 84-1643, 84-1649, 84-1651, 84-1652, 84-1670, 84-1671, 84-1672, 84-1692, 84-1693, 84-1694, 84-1695, 84-1696, 85-1243, 85-1272, 85-1287 & 85-1288

IN RE: SCHOOL ASBESTOS LITIGATION

SCHOOL DISTRICT OF LANCASTER
MANHEIM TOWNSHIP SCHOOL DISTRICT
LAMPETER-STRASBURG SCHOOL DISTRICT
and
NORTHEASTERN SCHOOL DISTRICT

v.

LAKE ASBESTOS OF QUEBEC, LTD., et al.

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge*, SEITZ, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, BECKER, STAPLETON, MANSMANN, *Circuit Judges*.

The petition for rehearing filed by The Celotex Corporation and Carey Canada, Inc., appellants in Nos. 84-1651 and 85-1243; GAF Corp., appellant in Nos. 84-1642, 85-1272 and 85-1288; Owens-Corning Fiberglas, appellant in 84-1672; Flintkote Company; H.K. Porter Co. and Southern Textile Corporation, appellants in No. 84-1696; Lac d'Amiante du Quebec, Ltee, appellant in No. 84-1671; Asbestos Corporation, Ltd., appellant in No. 84-1694; and Fibreboard Corporation, appellant in No. 84-1649, having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service

not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judges Adams and Sloviter did not participate in the consideration of this matter.

BY THE COURT,

/s/ Weis
Circuit Judge

DATED: June 2, 1986

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 84-1642, 84-1649, 84-1651, 84-1672, 84-1694, 85-1243, 85-1272, 85-1288

IN RE: ASBESTOS SCHOOL LITIGATION

IN RE: SCHOOL ASBESTOS LITIGATION
SCHOOL DISTRICT OF LANCASTER, etc.

vs.

LAKE ASBESTOS OF QUEBEC, LTD., et al.

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is O R D E R E D that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until July 31, 1986.

/s/ Weis
Circuit Judge

Dated: June 18, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: ASBESTOS SCHOOL LITIGATION

MASTER FILE NO. 83-0268
THIS DOCUMENT RELATES TO: ALL ACTIONS

MEMORANDUM AND ORDER

KELLY, *J.* SEPTEMBER 28, 1984

Presently before the Court is plaintiffs' motion for class certification pursuant to Rule 23 of the Federal Rules of Civil Procedure. Plaintiffs seek certification of a class of essentially all public school districts and private schools in the nation to recover the costs incurred in undertaking asbestos abatement remedial action. Class certification is sought under Rule 23(b)(1)(B), (b)(2) and (b)(3).

The initial complaints in these matters were filed on January 17, 1983, and March 23, 1983, respectively. The representative plaintiffs are four public school districts: the School District of Lancaster, the Manheim Township School District, and Lampeter-Strasburg School District, which reside in the Eastern District of Pennsylvania; and the School District of Barnwell, South Carolina, which is found in the District of South Carolina.

The defendants in these companion actions are members of the asbestos industry. Asbestos products have been used in the construction of schools and other public buildings in the form of spray or trowel-applied coating material for building surfaces, including ceilings, as well as for insulation on pipes and boilers. With the exception of Johns-Manville Corporation, against whom legal process is stayed because of the pending bankruptcy proceedings, the defendants represent, for the time period alleged in the complaints, all of the major producers of friable asbestos construction and insulation products of the type found in

public and private schools throughout the nation, along with their principal suppliers of raw asbestos.

The complaints are grounded in state law, and federal jurisdiction is based upon 28 U.S.C. § 1332 (1982), diversity of citizenship jurisdiction.[1] The complaints allege liability on the basis of negligence, strict liability in tort, intentional tort, breach of warranty, concert of action and common law conspiracy. In addition to recovery of compensatory and punitive money damages, the complaints seek equitable relief in the form of restitution and mandatory injunctive relief involving asbestos abatement remedial action.

I. FACTUAL BACKGROUND

This litigation was triggered by action of the United States Environmental Protection Agency ("EPA") and the Congress. In 1980, the EPA investigated the presence of asbestos in the nation's schools and determined that it constituted a serious hazard to the health of school children and school employees. As a result of the EPA's investigation and findings, the agency promulgated proposed regulations, pursuant to the Toxic Substances Control Act, 15 U.S.C. § 2605 (1982), requiring every public and private

1. Because this action is solely a diversity case, the Anchorage School District has challenged the standing of the named plaintiffs. It argues that these plaintiffs lack standing to assert claims on behalf of class members in jurisdictions other than their own. While this argument has some superficial appeal, upon closer analysis, it is apparent that standing requirements are satisfied. Standing, which derives from the article III case or controversy requirement, is met when the plaintiff can demonstrate "injury in fact." *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972). To what extent that injury is legally cognizable under the laws of the various jurisdictions is a separate inquiry. "Whether or not the named plaintiff who meets individual standing requirements may assert the rights of absent class members is not a standing issue, but depends rather on meeting the prerequisites of Rule 23. . . ." 1 H. Newberg, *Newberg on Class Actions* § 1072a, at 124 (1977). Plaintiffs have demonstrated injury in fact and their injury is typical of injury sustained by all putative class members. That is all that is required under Fed. R. Civ. P. 23. *Cf. Kauffman v. Dreyfus Fund, Inc.*, 434 F.2d 727, 732-34 (3d Cir. 1970), *cert. denied*, 401 U.S. 974 (1971); *Plum Tree, Inc. v. Rouse Company, Inc.*, 58 F.R.D. 377, 375 (E.D. Pa. 1972).

school in the country to test for the presence of asbestos. 40 C.F.R. §§ 763.100-.119 (1983).

At approximately the same time the EPA promulgated the above proposed regulations, Congress considered and enacted the Asbestos School Hazard Detection and Control Act of 1980, 20 U.S.C. §§ 3601-3611 (1982). Recognizing the financial hardship imposed by the EPA regulations, the legislature made provision for public and private schools to obtain interest-free loans to accomplish the testing mandated by the EPA and to help defray the costs of subsequent remedial action. However, because of political and budgetary considerations, Congress refrained from making any appropriations for carrying out asbestos abatement remedial action. Instead, Congress directed the United States Attorney General to investigate and report to Congress which parties should bear the ultimate financial and legal responsibility for school asbestos abatement remedial action.

In August, 1981, the Attorney General issued his report finding that important federal environmental policies mandated abatement of the school asbestos problem, and that the asbestos industry should be held responsible. Land and Natural Resources Div., U.S. Dep't of Justice, 97th Cong. 1st Sess., *The Attorney General's Asbestos Liability Report to Congress* iv-vii (Comm. Print 1981) ("Attorney General's Report") (Exhibit C, Plaintiffs' Memorandum in Support of Motion for Class Certification). The Attorney General's Report went on to conclude that no additional federal duty-imposing legislation was necessary and that schools could rely on existing state common law to recover from the industry. *Id.* After the issuance of the Attorney General's Report, this litigation ensued.

II. PROCEDURAL BACKGROUND

Subsequent to the filing of the complaints in the four companion cases, plaintiffs moved, on March 30, 1984, for class certification. Shortly after, plaintiffs filed an additional motion for immediate class certification against certain defendants, including United States Gypsum Co., National Gypsum Company and W. R. Grace & Co. These three defendants agreed not to oppose

a nationwide mandatory class certified under Rule 23(b)(1) and/or 23(b)(2).[2] The logic of these defendants' position was that it was far preferable for them to face one "global" action rather than to litigate thousands of individual cases. On April 13, 1984, this Court certified a mandatory class pursuant to Rules 23(b)(1)(B) and 23(b)(2) as against the three aforementioned defendants. The Order also enjoined the filing of any new complaints or the prosecution of any pending state or federal actions against the three non-opposing defendants. A hearing was set for May 11, 1984 at which time the Court permitted any party to appear and apply for relief from the April 13, 1984 Order.

As a result of the April 13 Order, the alignment of various parties to the litigation shifted. Rather than the usual "plaintiff(s) for" and "defendant(s) against" structure, the school asbestos case divided along the following lines:

1. ***Plaintiffs Supporting Mandatory Class Action Certification.***

This group has, throughout these proceedings, argued for a nationwide mandatory class of plaintiff school districts.[3]

2. ***Defendants Supporting Mandatory Class Action Certification.***

This group of three defendants, United States Gypsum Co., National Gypsum Company and W.R. Grace & Co., also referred to in papers and at oral argument as the nonopposing or

2. Certification under Rule 23(b)(1) and (b)(2) is mandatory in that those who meet the description of the class are not permitted to "opt out" of the class action. Certification under Rule 23(b)(3) is voluntary in that any putative class member is free to "opt out" of the class and commence independent litigation. *See Kyriazi v. Western Elec. Co.*, 647 F.2d 388, 393 (3d Cir. 1981); *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239, 252-53 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975); *Fox v. Prudent Resources Trust*, 69 F.R.D. 74, 77 (E.D. Pa. 1975).

3. The spokesperson for this group is plaintiffs' co-lead counsel David Berger, Esquire. Mr. Berger has associated with, among other counsel, Professor Charles Alan Wright of the University of Texas. Professor Wright addressed the Court at a hearing held on July 30, 1984.

stipulating defendants, likewise seeks to have a mandatory class certified.[4]

3. *Plaintiffs Opposing Mandatory Class Certification and Supporting an Opt-Out Class Pursuant to Rule 23(b)(3).*

This group's principal representative is the Barnwell School District of South Carolina,[5] one of the four named plaintiffs in this case. This group is strongly opposed to the certification of a mandatory class under Rule 23(b)(1) or (b)(2), but does support an opt-out class pursuant to Rule 23(b)(3).

4. *Defendants Opposing Class Certification Under Any Provision of Rule 23.*

This group opposes any class certification whether mandatory or opt-out.[6]

Oral argument was held on a motion to vacate the April 13 Order on May 11, 1984. On July 16, 1984, the Court vacated its April 13th Order to the extent that the injunction restraining the prosecution of any case filed prior to April 13, 1984 was lifted.

On July 30, 1984 the Court heard oral argument on the merits of the class certification issue. At that time, the Court invited counsel to submit proposals on how a class could be structured so as to maximize the economies accruing to a class action while

4. Lawrence T. Hoyle, Jr., Esquire, counsel to National Gypsum Company and defendants' co-liaison counsel, has acted on behalf of these defendants.

5. Barnwell School District is represented by the law firm of Blatt and Fales, Barnwell, SC. Having terminated David Berger as local counsel subsequent to the April 13th Order, Blatt and Fales associated with Herbert L. Newberg, Esquire, as local counsel. Mr. Newberg is the author of the multivolume treatise entitled *Newberg on Class Actions* (1977). Mr. Newberg was subsequently designated co-lead counsel by Order of the Court dated July 17, 1984. Blatt and Fales have also associated with Professor Arthur R. Miller of Harvard University. Professor Miller addressed the Court at the May 11, 1984 and July 30, 1984 hearings.

6. Ralph W. Brenner, Esquire, counsel to the Celotex Corporation and Carey Canada, Inc. and defendants' co-liaison counsel, represented the position of this group of defendants.

avoiding the pitfalls associated therewith. The Court futher advised counsel that with that last submission, the "paper chase will have ended," Tr. at 9, and no further obstacle would remain to the decision of the case. It is to that decision I now turn.

III. LEGAL DISCUSSION

In order for a suit to be maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure, the named plaintiffs must establish each of the four threshold requirements of Rule 23(a)[7]: numerosity, commonality, typicality, and adequacy of representation. *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d at 246. These requirements are mandatory and failure to establish any one of the Rule 23(a) requirements is fatal to a motion for class action certification. *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 161 (1982); *Alexander v. Gino's, Inc.*, 621 F.2d 71 (3d Cir.) (per curiam), *cert. denied*, 449 U.S. 953 (1980); *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d at 246; *Katz v. Carte Blanche Corporation*, 496 F.2d 747, 756 (3d Cir.) (en banc), *cert. denied*, 419 U.S. 885 (1974); *Paskel v. Heckler*, 99 F.R.D. 80, 83 (E.D. Pa. 1980).

The named plaintiffs must then show that the action qualifies for class action treatment under at least one of the subsections of Rule 23(b). [8] *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d at 248. Plaintiffs argue that the proposed class meets the requirements and therefore may be maintained under subsections (b)(1)(B), (b)(2) and (b)(3) of Rule 23. In connection with

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7. Rule 23(a) provides in pertinent part:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

8. For the text of Rule 23(b) *see* note 11 *infra*.

this analysis, the burden of proof remains with the named plaintiffs to set forth sufficient factual information to enable the Court to reasonably permit the action to continue as a class under Rule 23. *Davis v. Romney*, 490 F.2d 1360, 1366 (3d Cir. 1974); *Ladele v. Consolidated Rail Corp.*, 95 F.R.D. 198, 200 (E.D. Pa. 1982); *Ciarrochi v. Provident Nat. Bank*, 83 F.R.D. 357, 360 (E.D. Pa. 1979).

Finally, it is well established that "the central issue raised in a motion for certification is whether a class action is appropriate, not the probability of plaintiff's success on the merits of the substantive claims." *Chestnut Fleet Rentals, Inc. v. Hertz Corp.*, 72 F.R.D. 541, 543 (E.D. Pa. 1976) (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974)); *Kahan v. Rosenstiel*, 424 F.2d 161, 169 (3d Cir.), *cert. denied*, 398 U.S. 950 (1970).

Having carefully considered the arguments presented by counsel in both their oral and written presentations,[9] I have concluded that a class will be conditionally certified pursuant to Rule 23(b)(3). I have further concluded that a class will also be conditionally certified under Rule 23(b)(1)(B) on the limited issue of punitive damages.

A. Rule 23(a)

1. *Numerosity*

The first prerequisite of Rule 23(a) is that the class must be "so numerous that joinder of all members is impracticable." Fed.

9. In his presentation to the Court on July 30, 1984, counsel for Barnwell School District, Herbert L. Newberg, Esquire, observed that "[b]oth sides have cut down many trees, in filing their class action briefs, motions, their exhibits . . . If the class action is decided on the weight of the briefs filed, it would be a very close question, probably four gold medals to all of the adverse sides." Tr. at 88. While the Court does not wish to suggest that the scales of justice are to be applied literally, I do share Mr. Newberg's assessment of the Olympian efforts contributed by counsel. The Court's role in deciding the difficult and important question before it has been greatly aided by the diligence, thoroughness and scholarship evidenced in the papers submitted and arguments presented. The Court wishes to express its special appreciation to Professor Miller whose views were particularly elucidating on the complex procedural issues raised by this class certification motion.

R. Civ. P. 23(a)(1). As to the numerosity requirement, no legitimate objection to certification can be made. There are approximately 36,000 public school districts and private elementary and secondary schools in the United States. U.S. Dep't. of Educ., *Asbestos In the Schools, A Report to the Congress*, 20 (Sept. 15, 1983) (Exhibit J, Plaintiffs' Memorandum in Support of Motion for Class Certification). Of the 36,000 public school districts and private schools, the United States Department of Education estimates that friable asbestos is present in approximately 14,000 schools. *Id*. Plaintiffs estimate that approximately 8,500 public school districts and private schools manifest an asbestos abatement problem. Affidavit of David Berger §5 (Exhibit R; Plaintiffs' Memorandum in Support of Motion for Class Certification).

There is, of course, no geographical or numerical limit expressed by Rule 23(a)(1) itself, *see Mertz v. Harris*, 497 F.Supp. 1134, 1138 (S.D. Tex. 1980); *Simon v. Westinghouse Elec. Corp.*, 73 F.R.D. 480, 483 (E.D. Pa. 1977) (690,000 putative class members); *In re Penn Central Securities Litigation*, 62 F.R.D. 181, 189 (E.D. Pa. 1974), nor is it necessary that the class representatives have precise knowledge of the exact number of members of the class for purposes of determining that joinder is impracticable. *Hedges Enterprises, Inc. v. Continental Group*, 81 F.R.D. 461, 464-65 (E.D. Pa. 1979). It suffices that it be readily apparent — as is unmistakably the case here — that the size of the class makes joinder impracticable. *Piel v. National Semiconductor Corp.*, 86 F.R.D. 357, 365 (E.D. Pa. 1980).

2. *Commonality*

Rule 23(a)(2), requires the existence of "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). The requirement of commonality is aimed at determining whether there is a need for combined treatment and a benefit to be derived therefrom. The section has been liberally construed, and "those courts that have focused on Rule 23(a)(2) have given it a permissive application so that common questions have been found to exist in a wide range of contexts." 7 C. Wright & A. Miller, *Federal Practice and Procedure* § 1763, at 604 (1972). The "permissive application may undoubtedly be attributed to the premise . . .

that is, in doubtful cases, the Court should favor the certification of the class." *Piel v. National Semiconductor Corp.*, 86 F.R.D. at 367; *Simon v. Westinghouse Elec. Corp.*, 73 F.R.D. at 487. Rule 23(a)(2) does not require that all issues in the litigation be common, only that common questions exist. *Hummel v. Brennan*, 83 F.R.D. 141, 145 (E.D. Pa. 1979); *Kuhn v. Philadelphia Electric Co.*, 80 F.R.D. 681, 684 (E.D. Pa. 1978). Indeed, a single common question is sufficient to satisfy Rule 23(a)(2). *Simon v. Westinghouse Elec. Corp.*, 73 F.R.D. at 484. Furthermore, not every question of law or fact must be common to each individual member of the class, *Hedges Enterprises, Inc. v. Continental Group*, 81 F.R.D. at 465; *Axelrod v. Saks & Co.*, 77 F.R.D. 441, 444 (E.D. Pa. 1978); *Fox v. Prudent Resources Trust*, 69 F.R.D. at 78, nor is there a requirement that answers to common questions guarantee a determination of liability. *Payton v. Abbott Labs*, 83 F.R.D. 382, 387 (D.Mass. 1979), *vacated* 100 F.R.D. 336 (1983).

A common question is one which arises from a "common nucleus of operative facts" regardless of whether "the underlying facts fluctuate over the class period and vary as to individual claimants." *Cohen v. Uniroyal, Inc.*, 77 F.R.D. 685, 690-91 (E.D. Pa. 1977); *In re Corrugated Container Antitrust Litigation*, 80 F.R.D. 244, 250 (S.D. Tex. 1978). *See also Muth v. Dechert, Price & Rhoads*, 70 F.R.D. 602, 607 (E.D. Pa. 1976) (common course of conduct yields common questions). In mass tort actions, the requirement of common questions has been satisfied by a showing of commonality either as to liability, *Ouellette v. International Paper Co.*, 86 F.R.D. 476, 479 (D.Vt. 1980); *Coburn v. 4-F Corp.*, 77 F.R.D. 43, 44 (E.D. Ky. 1977), or as to the cause or impact of the tortious action, *In re Three Mile Island Litigation*, 87 F.R.D. 433, 439, (M.D. Pa. 1980) ("*Three Mile Island*").

Plaintiffs allege a number of claims involving both legal and equitable relief. The predicate of each claim is a violation of law, or breach of a legal duty, which, in conjunction with a showing of injury causally linked to defendants' wrongful conduct, creates liability to the members of the class. Although each claim is grounded in the breach of a separate, independent duty owed

the individual members of the class, the underlying "common core of questions," *Cohen v. Uniroyal, Inc.*, 77 F.R.D. at 690, which plaintiffs contend make out a *prima facie* case of breach of a legal duty under the theories of liability specified in the complaint, are as follows:

> (a) the general health hazards of asbestos;
>
> (b) defendants' knowledge or reason to know of the health hazards of asbestos;
>
> (c) defendants' failure to warn/test; and
>
> (d) defendants' concert of action and/or conspiracy involving formation of and adherence to industry practices.

All of these elements can be established by common proof, which, although it may be complex, does not vary from class-member school to class-member school. Plaintiffs have demonstrated common questions sufficient to satisfy Rule 23(a)(2).

3. *Typicality*

Rule 23(a)(3) requires that "the claims . . . of the representative parties" be "typical . . . of the claims of the class." Fed. R. Civ. P. 23(a)(3). The indicia of this requirement are summarized in *Sley v. Jamaica Water & Util.*, 77 F.R.D. 391 (E.D. Pa. 1977):

> The typicality requirement functions as a safeguard against interclass conflicts and an assurance that the plaintiff's interests are more or less co-extensive with those of the class. In other words, . . . the class representative's claims must be typical in that his or her litigative posture must be sufficiently co-extensive with those of the class such that the class members' causes of action are fully, fairly and vigorously prosecuted.

Id. at 394 (citations omitted). *Accord Cohen v. Uniroyal, Inc.*, 77 F.R.D. at 691; *Sharp v. Coopers & Lybrand*, 70 F.R.D. 544, 548 (E.D. Pa. 1976). As the court observed in *General Telephone Co. of Southwest v. Falcon:*

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> The commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.

457 U.S. at 157 n.13. *See also* 3B J. Moore, *Moore's Federal Practice*, ¶23.06-2 (2d ed. 1978) (the extent to which this requirement differs, if at all, from other requirements of Rule 23(a) is unclear).

While the focus is on the relatedness of the named plaintiffs' claims and those of the class members, the harm suffered by the named plaintiffs may differ in degree from that suffered by other members of the class so long as the harm suffered is of the same type. *McQuilken v. A. & R. Development Corp.*, 576 F.Supp. 1023, 1029 (E.D. Pa. 1983). "[C]laims [are considered] typical when the 'essence' of the allegations concerning liability, and not the particularities, suggest adequate representation of the interests of the proposed class members." *Peil v. Speiser*, 97 F.R.D. 657, 659 (E.D. Pa. 1983) (quoting *Piel v. National Semiconductor Corp.*, 86 F.R.D. at 371). In addition, "a plaintiff's claim is typical if it arises from the same event or course of conduct that gives rise to the claims of other class members and is based on the same legal theory." *Paskel v. Heckler*, 99 F.R.D. at 84 (citation omitted).

As previously demonstrated, the plaintiffs' claims raise issues harmonious with all class members as to the common issues of liability upon theories of negligence, strict liability, breach of warranty, intentional tort, concert of action and civil conspiracy. As a consequence, the named plaintiffs stand in a similar position as all other members of the class, in satisfaction of this subdivision.

4. *Adequacy of Representation*

The final requirement of Rule 23(a)(4) is that "the representative parties will fairly and adequately protect the interests

of the class." Fed. R. Civ. P. 23(a)(4). In *Wetzel v. Liberty Mutual Insurance Co.*, the Third Circuit identified the elements of adequacy of representation as follows: "Adequate representation depends on two factors: (a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class." 508 F.2d at 247 (citation omitted). *Accord Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 449 (3rd Cir. [1977]), *cert. denied*, 434 U.S. 1086 (1978). The burden is on the defendant to demonstrate that the representation will be inadequate. *Lewis v. Curtis*, 671 F.2d 779, 788 (3d Cir.), *cert. denied*, 459 U.S. 880 (1982).

The named plaintiffs are represented by counsel who are very experienced with class action litigation and throughly familiar with property damage and mass disaster litigation.[10] Identical or similar evidence will be proffered by each plaintiff as to all of the fundamental liability issues in this action. Plaintiffs' interests are sufficiently aligned with those of the class members they seek to represent. Therefore, this element of Rule 23(a)(4) is satisfied as well.

B. Rule 23(b)(3)

Rule 23(b)(3)[11] applies to class certification of actions pri-

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10. *See* notes 3 & 5 *supra*. Indeed, the quality of all counsel associated with this case is a factor in the Court's determination that this case can be properly managed as required by Rule 23(b)(3)(D).

11. Rule 23(b) provides in relevant part:

> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for, the party opposing the class, or
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
>
> (2) the party opposing the class has acted or refused to act on

marily seeking money damages. Rule 23(b)(3) requires that (1) common questions of law or fact raised by the litigation in which class determination is being sought predominate over individual questions and (2) that class treatment be superior to other procedures available for handling the damages claims in question. Fed. R. Civ. P. 23(b)(3).

In determining whether the relevant criteria of Rule 23(b)(3) have been met, the Third Circuit Court of Appeals has established the following quidelines:

> The predominance finding requires at a minimum the identification of the legal and factual issues, common and diverse, and an identification of the class members to which those relate. . . . The superiority finding requires at a minimum (1) an informed consideration of alternative available methods of adjudication of each issue, (2) a comparison of fairness to all whose interests may be involved between such alternative methods and a class action, and (3) a comparison of the efficiency of adjudication of each method.

Katz v. Carte Blanche Corporation, 496 F.2d at 756-57, *cited with approval in Bogosian v. Gulf Oil Corp.*, 561 F.2d at 448. Assuming that the analysis of these points is correct, the district court has broad discretion to grant or deny class certification. *Katz v. Carte Blanche Corporation*, 496 F.2d at 757; *Bogosian v. Gulf Oil Corp.*, 561 F.2d at 448.

1. *Predominance*

In assessing whether common questions predominate, most courts have adopted a pragmatic approach which emphasizes how efficient class treatment will be, the significance of the common questions, and whether class certification would result in

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grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

the serious distortion of the lawsuit. 3B J. Moore, *Moore's Federal Practice* ¶23.45[2] (1978). Professors Wright and Miller state that when "common questions represent a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is a clear justification for handling the dispute on a representative rather than on an individual basis." 7A C. Wright and A. Miller, *Federal Practice* and *Procedure*, §1778, at 53 (1972). Several courts have found class certification to be appropriate "where common issues important to the litigation can be resolved on a class-wide basis even though the common issues may not be dispositive." *McQuilken v. A & R Development Corp.*, 576 F.Supp. at 1031.

This pragmatic approach is implicit in the analytical framework utilized in *Bogosian v. Gulf Oil Corp.* Under *Bogosian*, the determination of the appropriateness of class certification of damage claims under Rule 23(b)(3) involves a three-part analysis of the basic elements of civil damage claims. Those elements consist of: (1) violation of law; (2) fact of injury; and (3) damages. 561 F.2d at 449, 454-56. *See also In re Glassine and Greaseproof Paper Antitrust Litigation*, 88 F.R.D. 302, 306-07 (E.D. Pa. 1980); *Heiges Enterprises, Inc. v. Continential Group*, 81 F.R.D. at 473-76. Restated in terms of recovery in tort, it is necessary to demonstrate breach of a legal duty; causation between the violation and injury to the plaintiff, including injury in fact and proximate cause; and damages. These principles of analysis have been recognized in tort class certification decisions. *See, e.g., In re Agent Orange Product Liability Litigation*, 100 F.R.D. 718, 721-23 (E.D.N.Y. 1983) ("*Agent Orange*"); *Three Mile Island*, 87 F.R.D. at 439-40.

The first element to be analyzed to determine whether common questions of law or fact predominate over individual ones pursuant to Rule 23(b)(3) is the alleged violations of law as to which class certification is sought. As discussed previously, the complaint alleges six claims for damages: negligence, strict liability, breach of warranty, intentional tort, concert of action and civil conspiracy.

These claims, as noted, arise out of the same common nucleus of operative facts relating to defendants' conduct and the

nature of asbestos products. Common questions relating to the hazards of asbestos, the knowledge of the defendants of the hazards, industry policies and practices and defendants' failure to warn and to test are at the core of all the damage claims for relief, and will dominate other issues at trial, regardless of how defendants' conduct is characterized in terms of a specific tort.

The second element of the *Bogosian* analysis relevant to determining whether common questions of law or fact predominate over individual ones under Rule 23(b)(3) is the question "fact of injury" or "impact". The issue of impact, or as it is more commonly known, causation, focuses on the effects of the defendants' conduct on individual members of the class and may be proved on a classwide basis. The Third Circuit Court of Appeals has stated:

> Since, as we have indicated, the second aspect of fact of damage is a simple concept of causation, any evidence which is logically probative of a loss attributable to the violation will advance plaintiff's case. There is absolutely no requirement that the loss be personal or unique to plaintiff, so long as the plaintiff has suffered loss in his business or property, for as we have noted, this second aspect of fact of damage is not concerned with any policy of limiting liability. Thus, when [a] . . . violation impacts upon a class of persons who do have standing, *there is no reason in doctrine why proof of the impact cannot be made on a common basis so long as the common proof adequately demonstrates some damage to each individual*.

Bogosian v. Gulf Oil Corp., 561 F.2d at 454 (emphasis added).

In the instant case, defendants' alleged misconduct has had broad, pervasive effects on the school class. Plaintiffs allege that as a result of defendants' failure to warn the nation's elementary and secondary schools of the hazards of asbestos and asbestos-containing products, the school class installed large quantities of friable asbestos material in school buildings. Because of the alleged grave health hazard posed by asbestos, schools have undertaken asbestos abatement remedial action to eliminate the hazard and have incurred enormous financial costs as a result.

Thus, plaintiffs' proposed proof of impact under the above formulation, that is, demonstration of a general effect in the form of the creation of the hazard and specific proof of expenditures, falls within the *Bogosian* guidelines.

The second element of causation, proximate or legal cause raises primarily a question of law relating to the ambit or scope of legal liability under the law of torts. W. Prosser, *Law of Torts*, § 42, at 244 (4th ed. 1971). This legal issue can be resolved on a classwide basis without involving individualized, class-member by class-member proof.

Finally, "the 'overwhelming weight of authority' holds that the need for individual damages calculations does not diminish the appropriateness of class action certification where common questions as to liability predominate." *Wolgin v. Magic Marker Corp.*, 82 F.R.D. 168, 176 (E.D. Pa. 1979) (quoting 5 H. Newberg, *Newberg on Class Actions* § 8824(b), at 879 (1977)).

2. *Superiority*

The concept of superiority essentially involves a value judgment which takes into account a number of competing interests. As the Third Circuit stated in *Katz v. Carte Blanche Corporation:*

> Superiority must be looked at from the point of view (1) of the judicial system, (2) of the potential class members, (3) of the present plaintiff, (4) of the attorneys for the litigants, (5) of the public at large and (6) of the defendant. The listing is not necessarily in order of importance of the respective interests. Superiority must also be looked at from the point of view of the issues.

496 F.2d at 760.

In my view, the school asbestos litigation is uniquely suitable to class action treatment. The bench, bar and public at large are only too well aware of the staggering costs that the asbestos personal injury litigation has generated. Clearly, classwide disposition of at least some of the issues in this litigation, instead of

case-by-case adjudication, would realize great savings in litigation costs. Instead of hundreds or thousands of school asbestos cases in separate forums, the litigation would be concentrated in a single forum, thereby economizing litigation expenses. Moreover, there would be one set of attorneys for both sides resulting in significant savings in attorneys' fees. In this case, "with the presence of a common core which predominates, considerations of judicial efficiency and economy, overall expense and uniformity will be furthered by permitting this case to proceed as a class action." *Sharp v. Coopers & Lybrand*, 70 F.R.D. at 548.

While the Advisory Committee Notes caution against certifying mass tort cases under Rule 23(b)(3), 39 F.R.D. 69, 103 (1966), this case involves a mass tort relating to property damage rather than personal injury. *McQuilken v. A & R Development Corp.*, 576 F.Supp. at 1032. Hence, many of the jurisprudential considerations, such as an injured plaintiff's right to choose his or her forum and to choose his or her counsel, as well as the unique characteristics of causation and injury which have led courts to hesitate to certify mass tort cases, *In re Northern Dist. of Cal., Dalkon Shield, etc.*, 693 F.2d 847, 852-54 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983) (citing cases) ("*Dalkon Shield*"); *Delaney v. Borden, Inc.*, 99 F.R.D. 44, 44-45 (E.D. Pa. 1983); *Sanders v. Tailored Chemical Corp.*, 570 F. Supp. 1543, 1543 (E.D. Pa. 1983), are not present in this case. *See* 7A C. Wright and A. Miller, *Federal Practice and Procedure*, § 1783, at 115-16 (1972).

3. 23(b)(3)(A-D)

Having carefully considered the factors which are set forth in Fed. R. Civ. P. 23(b)(3)(A-D), I am convinced that the certification of a class under Rule 23(b)(3) is appropriate in this case.[12]

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12. Rule 23(b)(3)(A-D) provides in relevant part:
The matters pertinent to the findings [of predominance and superiority] include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or

The disposition of this litigation under a Rule 23(b)(3) class allows those school districts who wish to pursue individual actions to do so. Many of the larger school districts, such as Los Angeles and Chicago, have a significant interest in pursuing their own actions. However, many more thousands of districts will be benefited by being relieved of the onerous burden of bringing a complex action which could consume in costs more than the recovery anticipated.

To date, there are approximately 50 cases filed in state and federal courts. Only one has proceeded to judgment. Thus, the certification of this action comes at a time when the vast majority of the class members can make a meaningful decision to participate or to opt out.

Whether the Eastern District of Pennsylvania offers any unique advantage as a forum for litigating this case is problematical. However, if this case is to be litigated as a nationwide class, no other forum has any special advantage which augers for litigating elsewhere.

One matter, bearing on the manageability of this litigation, which defendants raise in opposition to any type of class certification, is the applicability of the state law of 54 jurisdictions. At first blush, this aspect of the litigation would seemingly prevent nationwide class certification. *See Brummett v. Skyline Corp.*, No. C 81-0103(B), slip op. at 9-10 (W.D.Ky. April 11, 1984); *Harrigan v. United States*, 63 F.R.D. 402, 405 (E.D. Pa. 1974). However, on further reflection, the problem is not nearly so complex. First, there is substantial duplication among the various jurisdictions as to the applicable law. For example, as to negligence, 51 jurisdictions are in virtual agreement in that they apply the Restatement (Second) of Torts § 388. As to strict liability, the basic test is Restatement (Second) of Torts § 402(A) that one who sells a product in a defective condition unreasonably dangerous to the user is liable. Forty-seven jurisdictions have adopted strict liability theories and all of them start with the

NOTES *(Continued)*

against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

concept of a defective product. In addition, plaintiffs have represented that they will direct discovery and trial briefs to meet the most stringent tests of liability. Finally, as the need arises, subclasses can be created to account for variances pursuant to Rule 23(c)(4).[13] *Fox v. Prudent Resources Trust*, 69 F.R.D. at 77.

This is not to suggest that I believe that managing this litigation is wholly without difficulty, as it most assuredly is not. But, at this point, I believe that the management problems can be overcome.[14] Notwithstanding the difficulty, "the proposed class action appears superior to the only existing alternative, which is repetitive individual litigation." *Wolgin v. Magic Marker Corp.*, 82 F.R.D. at 179.

C. Rule 23(b)(1)(B)

Plaintiffs contend that this action meets the requirements of a Rule 23(b)(1)(B) mandatory class under the so-called "limited fund" standard. Plaintiffs' argument in this regard consists of two strands. On the one hand, plaintiffs argue that due to the costs involved in meeting potential claims, defendants' assets may be exhausted before all claimants could be compensated.[15]

On the other hand, plaintiffs assert that there is a substantial possibility that early awards of punitive damages will impair or impede the ability of future claimants to obtain punitive damages. Under this theory, it is not the total assets of the defendants that places a limitation on future plaintiffs' ability to obtain awards of such damages; rather, it is the very real possibility that subsequent plaintiffs will find themselves in litigation in which

13. Rule 23(c)(4) provides in relevant part:

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

14. *See* note 10 *supra*.

15. While plaintiffs have advanced this argument, they have not seriously pursued it, hence the Court declines to address it on the merits. In addition, no substantive evidence is before the Court which demonstrates that the combined assets of the defendants would be insufficient to meet the plaintiffs' claims.

defendants "will have been found [by the courts] to have been sufficiently punished," Williams, J., *Mass Tort Class Actions: Going, Going, Gone?*, 98 F.R.D. 323, 333 (*"Mass Tort Class Actions"*), such that further awards of punitive damages would only result in "overkill". *See Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967).

Two circuit courts which have considered Rule 23(b)(1)(B) certification in the context of mass torts have rejected it. In *Dalkon Shield*, the Ninth Circuit, while not specifically foreclosing the possibility of a (b)(1)(B) class, nonetheless held that (b)(1)(B) certification is proper only when "separate punitive damages claims *necessarily* will affect later claims." 693 F.2d at 852 (emphasis added). The Eighth Circuit, in *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir. 1982), *cert. denied*, 459 U.S. 988 (1982) (*"Skywalk"*), concluded that certification under (b)(1)(B) enjoined pending state proceedings and therefore violated the Anti-Injunction Act, 28 U.S.C. § 2283 (1982).[16] The court rejected the argument that a limited punitive damages fund brought the class within the "in aid of [the court's] jurisdiction" exception to the Anti-Injunction Act. *Skywalk*, 680 F.2d at 1182. The court stated that, "the class has an uncertain claim for punitive damages against defendants who have not conceded liability. The claim does not qualify as a limited fund. . . ." *Id.*

The most recent analysis of (b)(1)(B) certification is contained in Chief Judge Jack Weinstein's opinion in *Agent Orange*. In formulating a standard against which to evaluate limited fund class certifications, Judge Weinstein adopted a "substantial probability" criteria, i.e., "less than a preponderance but more than a mere possibility." *Agent Orange*, 100 F.R.D. at 726. Applying this standard, Judge Weinstein concluded that the amount of compensatory damages and punitive damages, if allowed, would not exceed defendants' assets.

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16. The Anti-Injunction Act provides that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgment." 28 U.S.C. § 2283.

Having so found, Judge Weinstein nonetheless went on to conclude that a limited fund mandatory class should be established on the issue of punitive damages. Judge Weinstein reasoned as follows:

> [T]here is a substantial probability that limited punitive damages may be allowed. If they are, it would be equitable to share this portion of the possible award among all plaintiffs who ultimately recover compensatory damages. Yet, if no class is certified under Rule (b)(1)(B), non-class members who opt out under Rule 23(b)(3) would conceivably receive all of the punitive damages or, if their cases are not completed first, none at all.
>
> It is axiomatic that the purpose of punitive damages is not to compensate plaintiffs for their injury, but to punish defendants for their wrongdoing. In theory, therefore, when a plaintiff recovers punitive damages against a defendant, that represents a finding by the jury that the defendant was sufficiently punished for the wrongful conduct. There must, therefore, be some limit, either as a matter of policy or as a matter of due process, to the amount of times defendants may be punished for a single transaction. . . . There is, therefore, a substantial probability that 'adjudication with respect to individual members of the class . . . would as a practical matter be dispositive of the interests of the other members not parties to the adjudication.'

Id. at 728 (citations omitted).

Judge Weinstein's analysis of Rule 23(b)(1)(B) certification substantially comports with Judge Heaney's dissenting opinion in *Skywalk* which states in relevant part:

> Apart from the defendants' capacity to pay punitive damages, there is surely some limit imposed by law on the amount for which they can be held liable for a single wrongful act or course of conduct. Unlimited multiple punishment for the same act determined in a succession of individual

> lawsuits and bearing no relation to the defendants' culpability or the actual injuries suffered by victims, would violate the sense of 'fundamental fairness' that is essential to constitutional due process.

680 F.2d at 1188 (citations omitted) (Heaney, J., dissenting). Judge Heaney's opinion goes on to conclude that "[t]he justifications for imposing punitive damages include expressing society's disapproval of outrageous conduct, deterring such conduct in the future, and providing incentives for private civil enforcement. Each of these purposes is advanced by the district court's class certification here. Thus, a class-wide calculation of punitive damages would be proper." *Id.* at 1190 (citations omitted) (Heaney, J., dissenting).

While the issue concerning the Anti-Injunction Act did not arise in *Agent Orange*, *see* 100 F.R.D. at 726, it was, as noted previously, the *ratio decidendi* of the *Skywalk* opinion. With due deference to the other members of the panel, I find Judge Heaney's discussion, in his dissent, of the interaction between a mandatory punitive damages class under Rule 23(b)(1)(B) and the requirements of the Anti-Injunction Act to be the better view. As Judge Heaney states:

> A mandatory class action, of course, has a restrictive effect on related proceedings in any other court—state or federal. This is because, by definition, members of such a class cannot pursue independent litigation of class claims . . . .
>
> Here, the necessary restrictive effects of the mandatory class action are twofold. The first restrictive effect is that class members would not be able to pursue a punitive damage claim in an independent action. Such a restriction is absolutely necessary to the district court's jurisdiction over this class issue due to the applicable state law on punitive damages.

680 F.2d at 1191-92 (citations omitted) (Heaney, J., dissenting).[17]

In addition to their reliance on the decisions of the Eighth and Ninth Circuit Courts of Appeal, parties to this litigation have also raised constitutional and policy considerations in opposition to a mandatory class. First, it is argued that this Court is bound, under *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), by the decision of the Supreme Court of Pennsylvania in *Klemow v. Time, Incorporated*, 466 Pa. 189, 352 A.2d 12, *cert. denied*, 429 U.S. 828 (1976). In *Klemow*, a consumer class action involving non-resident plaintiffs, the Pennsylvania Supreme Court stated: "Because the jurisdiction of the courts of the Commonwealth is territorially limited, the class may consist only of Pennsylvania residents. The class may also include non-residents who submit themselves to the jurisdiction of the state courts." *Id.* at 197, n.15, 352 A.2d at 16 n.15 (citations omitted). *See also Note, Multistate Plaintiff Class Actions: Jurisdiction and Certification*, 92 Harv. L. Rev. 718 (1979).

Defendants conclude that since Pennsylvania does not purport to assert jurisdiction over non-residents in a mandatory class, the federal court is, therefore, precluded from doing so. Apart from the fact that the parties cite no case decided on the basis of *Erie* and *Klemow*, their argument fails to account for the Supreme Court's holding in *Hanna v. Plumer*, 380 U.S. 460 (1965). In *Hanna*, the issue was whether the Massachusetts service of process rule would be applied rather than Fed. R. Civ. P. 4(d)(1). The Court stated:

> [Defendant] . . . suggests that the *Erie* doctrine acts as a check on the Federal Rules of Civil Procedure, that despite the clear command of Rule 4(d)(1), *Erie* and its progeny demand the application of the Massachusetts rule. Reduced to essentials, the argument is: (1) *Erie*, as refined in [*Guaranty*

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17. Under the applicable law of Missouri, it was unclear whether state law permitted more than one award of punitive damages. *Skywalk*, 680 F.2d at 1187.

> *Trust Co. of New York v.*] *York*, [326 U.S. 99 (1945)], demands that federal courts apply state law whenever application of federal law in its stead will alter the outcome of the case. (2) In this case, a determination that the Massachusetts service requirements obtain will result in immediate victory for respondent. If, on the other hand, it should be held that Rule 4(d)(1) is applicable, the litigation will continue, with possible victory for petitioner. (3) Therefore, *Erie* demands application of the Massachusetts rule. The syllogism possesses an appealing simplicity, but is for several reasons invalid.

Id. at 466. *See also Rees v. Mosaic Technologies, Inc.*, [742 F.2d 765, 767 (3d Cir. 1984)].

The *Hanna* Court refused to apply the *Erie* "outcome determinative" test, noting that the fundamental flaw in the defendant's "syllogism" was "the incorrect assumption that the rule of *Erie R. Co. v. Tompkins* constitutes the appropriate test of the validity and therefore the applicability of a Federal Rule of Civil Procedure". 380 U.S. at 469-70. Rather, in situations involving the Federal Rules, the appropriate inquiry is as follows:

> When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided *Erie* choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.

Id. at 471. Hence, it is standard practice for federal courts, pursuant to Rule 23, to exercise jurisdiction over national class actions. *See, e.g., Zeffiro v. First Pa. Banking & Trust Co.*, 96 F.R.D. 567 (E.D. Pa. 1983).

In addition to the *Erie* argument, various parties maintain that a mandatory class raises concerns related to the tenth

amendment.[18] The thrust of the argument is that the management of the public schools is at the heart of the police powers traditionally committed to local control. *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972), and is, therefore, beyond the purview of the federal courts.

It, of course, goes without saying that a federal court should be extremely circumspect when the facts of the case before it arguably implicate the tenth amendment. However, in the present case, I have concluded that the prohibited line has not been crossed. Firstly, the tenth amendment concern, as expressed in *National League of Cities v. Usery*, 426 U.S. 833 (1976), has been considerably undermined by more recent cases such as *Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981) and *EEOC v. Wyoming*, 460 U.S. 226 (1983). Secondly, the intrusion upon the interests of the school districts are minimal. Only the punitive damages issue will be conducted pursuant to a mandatory class. Lastly, the federal interest inherent in asbestos abatement is apparent from the nationwide scope of the problem and the actions that Congress has taken with respect thereto.

It is apparent that there is a substantial possibility that early awards of punitive damages in individual cases will impair or impede the ability of future claimants to obtain punitive damages. The reality of such impairment has been recognized by commentators and courts. *See* Wright, *The Successful Use of the Class Action Device*, 52 UMKC L. Rev. 141, 144-45 (1984); Seltzer, *Mass Tort Punitive Damages*, 52 Fordham L. Rev. 37, 61, 72-73 (1983); Note, *Mass Accident Class Actions*, 96 Harv. L. Rev. 1143, 1157 (1983); *Mass Tort Class Actions*, 98 F.R.D. at 333 (1983); *Restatement (Second) of Torts*, §908, comment e, at 467 (1979). *See also Acosta v. Honda Motor Co., Ltd.*, 717 F.2d 828, 838 (3d Cir. 1983); *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d at 839; *Agent Orange*, 100 F.R.D. at 725; *In re Related*

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18. The tenth amendment provides that: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

Asbestos Cases, 566 F.Supp. 818, 822 (N.D. Ca. 1983); *Rosener v. Sears Roebuck & Co.*, 110 Cal.App. 3d 740, 758-59, 168 Cal. Rptr. 237 (1980).

"A fundamental aspect of justice is parity of treatment. Persons similarly situated and aggrieved should be similarly treated." *Payton v. Abbott Labs*, 83 F.R.D. at 390. While the ability of the courts to deal with social problems of great magnitude is not limited, "it has been the tradition of the common law to adapt." *Id.* An observation made by another district court in certifying a (b)(1)(B) limited fund class seems particularly apropos in the present case: "Faced with contradictory nonbinding authority, a court must select that course of action which appears at the time to better assure equality of treatment for all litigants." *Cohen v. 4-R Corp.*, 77 F.R.D. at 46.

While the question is not without difficulty, I conclude that a mandatory class on the issue of punitive damages should be conditionally certified under Rule 23(b)(1)(B). In so doing, I adopt the suggestion of Judge Heaney in *Skywalk* that any litigant who chooses to opt out of the Rule 23(b)(3) class will be permitted to settle punitive damage claims, and that the defendants will receive credit for any such settlements when and if there is a classwide award of punitive damages. 680 F.2d at 1184-85 (Heaney, J., dissenting). Bearing in mind that no plaintiff has a legal right to punitive damages, the arrangement herein outlined would appear to be the least intrusive means of assuring fairness and equity to all parties.

D. Rule 23(b)(2).

Fed. R. Civ. P. 23(b)(2) provides that: "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." The complaints request two types of equitable relief: (1) mandatory injunctive relief in the form of asbestos abatement remedial action, and (2) restitution for expenditures already incurred by schools to remedy asbestos hazards.

Three forms of mandatory injunctive relief are requested. First, the complaints seek direct abatement action, including any necessary testing, inspection, analysis, removal of friable asbestos, and containment and/or replacement action warranted under the circumstances. Second, where containment action has already been taken by the schools, plaintiffs seek containment monitoring services consisting of maintenance of contained asbestos materials which remain in the schools under appropriate abatement practices. Third, the complaints seek medical detection/surveillance and monitoring services to identify and monitor children and school employees who may have been exposed to school asbestos.

In addition, plaintiffs seek equitable restitution for the costs of asbestos abatement remedial action already undertaken. They seek reimbursement under this theory for the monies expended performing a duty which they claim was the responsibility of the defendants.

Despite the ingenuity of plaintiffs' claims for equitable remedies, this case remains at bottom, one for legal damages. The Advisory Committee Notes to Rule 23(b) states that "[t]he [(b)(2)] subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages." 39 F.R.D. at 102.

Plaintiffs attempt to sidestep this requirement of Rule 23(b)(2) by casting their prayer for relief as restitution rather than money damages. The difference between the two remedies may be summarized as follows:

> The damages recovery is to compensate the plaintiff, and it pays him, theoretically, for his losses. The restitution claim, on the other hand, is not aimed at compensating the plaintiff, but at forcing the defendant to disgorge benefits that it would be unjust for him to keep.

D. Dobbs, Remedies, § 4.1, at 224 (1973).

The plaintiffs' argument that a request for a payment of future remedial expenses is equitable in nature has been rejected by the Court of Appeals for the Third Circuit. "A plaintiff cannot

transform a claim for damages into an equitable action simply by asking for an injunction that orders the payment of money." *Jaffee v. United States*, 592 F.2d 712, 715 (3d Cir.) (citations omitted), *cert. denied*, 441 U.S. 961 (1979). *Accord Three Mile Island*, 87 F.R.D. at 442.

Whether some type of equitable relief may be required in specific cases cannot at this stage of the litigation be clearly ascertained. It is, however, well settled that certification under 23(b)(3) does not preclude the granting of appropriate equitable relief. 7A C. Wright and A. Miller, *Federal Practice and Procedure*, § 1784, at 127 (1972) ("a federal court should [be] free to experiment in awarding relief under Rule 23. It has the tools to shape the remedy to meet the exigencies of each case. . . ."). However, the incidental need for limited equitable remedies cannot sustain certification under Rule 23(b)(2). *In re Sugar Industry Antitrust Litigation*, 73 F.R.D. 322, 343 (E.D. Pa. 1976). *Cf. Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d at 253 (employment discrimination class action certifiable under (b)(2) and (b)(3) should be certified as (b)(2)); *Connor v. Highway Truck Drivers & Helpers*, 68 F.R.D. 370, 375 (E.D. Pa. 1975) (monetary relief incidental to equitable relief).

E. Class Notice

The final consideration for the Court concerns the subject of notice to the class. Fed. R. Civ. P. 23(c)(2) provides:

> (2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each members that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

In the present case, the best notice practicable would be obtained by a first class mailing. *See Piel v. National Semiconductor Corp.*, 86 F.R.D. at 375. The school districts and private school members of the class may be readily identified via the resources of national and state school board associations. In addition to noticing the school boards, appropriate notice should be provided in trade journals as well as periodicals of general distribution. Clearly, the public at large has a substantial interest in whether or not the school boards opt out of the 23(b)(3) class as well as in the progress of the litigation concerning the punitive damage claims. The cost of notice will be borne by the plaintiffs.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: ASBESTOS SCHOOL LITIGATION

MASTER FILE NO. 83-0268

THIS DOCUMENT RELATES TO: ALL ACTIONS

ORDER NO. 20

AND NOW, this 28th day of September, 1984, for the reasons set forth in the foregoing Memorandum, it is hereby ORDERED that:

1. Plaintiffs' Motion pursuant to Fed. R. Civ. P. 23(b)(1)(B) for Class Certification on the limited issue of punitive damages is GRANTED.

2. Plaintiffs' Motion for Class Certification pursuant to Fed. R. Civ. P. 23(b)(2) is DENIED.

3. Plaintiffs' Motion for Class Certification pursuant to Fed. R. Civ. P. 23(b)(3) is GRANTED.

4. It is FURTHER ORDERED that plaintiffs who opt out of the Rule 23(b)(3) class will be permitted to settle punitive damages claims and defendants thus settling will be given credit for such amounts when, and if, punitive damages are awarded.

5. The class is defined as follows:

> All entities which own or operate in whole or in part any public educational facilities, as defined in section 198(a)(10) of the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 2854, throughout the United States; and all entities which own or operate in whole or in part any non-public, non-profit elementary or secondary educational facilities, including entities with religious affiliations, in the United States, to the

extent that such non-profit entities are owned or operated by one or more non-profit corporations or associations no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.

6. Any provision of Order No. 7, dated April 13, 1984 which is inconsistent with the provisions of this Order (Order No. 20) is hereby VACATED.

7. It is further ORDERED that plaintiffs shall forward a draft of their proposed notice form to the Court and the defendants on or before October 30, 1984. Any objections to the proposed notice shall be filed on or before November 15, 1984.

BY THE COURT:

/s/ James Kelly

JAMES McGIRR KELLY, *J.*

Supreme Court, U.S.
FILED
AUG 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-140

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE CELOTEX CORPORATION and
CAREY CANADA INC., *et al.*,
Petitioners

v.

SCHOOL DISTRICT OF LANCASTER, *et al.*,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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INTRODUCTION

This response is filed by class plaintiffs in the above-captioned proceeding in opposition to the petition by nine of some 50 defendants in this litigation for a writ of certiorari to the United States Court of Appeals for the Third Circuit, to review that portion of its judgment in *In re School Asbestos Litigation,* 789 F.2d 996 (3d Cir. 1986), *reh'g denied* (June 2, 1986), which affirmed the certification of a class under Fed.R.Civ.P. 23(b)(3).[1]

The salient procedural history in this case concerns the action of two federal courts in conditionally certifying a class action involving school asbestos property damage claims. The nationwide class which was certified by the District Court below on September 28, 1984, and affirmed in part by the Third Circuit Court of Appeals in its May 1, 1986 decision, consists of all elementary and secondary schools and school districts, public and private, seeking to recover from asbestos companies the costs of remedial action made necessary by the presence of asbestos in school buildings, as well as punitive damages. In its Pretrial Order No. 20, the District Court certified both a voluntary class under Fed.R.Civ.P. 23(b)(3) for compensatory damages and a no opt-out "mandatory" class under Fed.R.Civ.P. 23(b)(1)(B) for punitive damages. *In re Asbestos School Litigation,* 104 F.R.D. 422 (E.D. Pa. 1984) (J.A.0000327-28).[2] The Third Circuit vacated the 23(b)(1)(B) class but affirmed the 23(b)(3) class. *In re School Asbestos Litigation,* 789 F.2d 996 (3d Cir. 1986) (hereinafter, "*School Asbestos*"), *reh'g denied* (June 2, 1986).

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[1] Other major defendants did not challenge the Rule 23(b)(3) class certification in the District Court below or join in any appeals to the Third Circuit or in the instant petition.

[2] All citations to the Joint Appendix submitted by the parties in the appeals to the Third Circuit Court of Appeals are referenced as "(J.A.)."

According to the United States Environmental Protection Agency ("EPA"), asbestos-containing construction products were utilized, until December 31, 1978 (when they were banned as a construction material),[3] in the construction of public and private schools, as a fire retardant and acoustical insulation material on school building surfaces, such as ceilings and walls, and on unexposed foundation structures, and as insulation for pipes and boilers.[4] The claims of the schools certified for class treatment under Rule 23(b)(3) consist essentially of damage claims to recover the costs of asbestos remedial action with respect to such asbestos-containing construction materials. Remedial action consists of the testing and analysis of construction materials for the presence of friable asbestos-containing material, operations and maintenance programs to control friable asbestos material (including notice to employees and students), and more substantial abatement action such as removal, encapsulation and enclosure.[5] No matter what form the remedial action takes, it is based upon the common denominator of the *presence* of friable asbestos-containing materials in the schools.[6]

The magnitude of the presence of friable asbestos-containing materials in schools has been recognized to be substantial. Subsequent to the class certification decision of the District Court, the EPA published a study of the presence of friable asbestos materials in the nation's schools.[7] According to

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[3] *See, e.g., Final Rule: Asbestos; Friable Asbestos-Containing Materials in Schools; Identification and Notification,* 47 Fed. Reg. 23360, 23366, *codified in* 40 C.F.R. § 763.100, *et seq.* (May 27, 1982) (hereinafter, "*Final Rule*") (J.A.0001033).

[4] *See, e.g., Final Rule,* 53 Fed. Reg. 23361 (J.A.0001028).

[5] *See, e.g.,* the EPA's 1985 Edition of its *Guidance for Controlling Asbestos-Containing Materials in Buildings,* at pages S-1 - S-3 (hereinafter, "1985 EPA Guidance Document") (Appendix 1 to Class Plaintiffs' Appellee Brief to the Third Circuit Court of Appeals, filed Sept. 5, 1985).

[6] *See, generally,* summary of 1985 EPA Guidance Document, at S-1 - S-3 (Appendix 1 to Class Plaintiffs' Appellee Brief to the Third Circuit Court of Appeals).

[7] *See Evaluation of the EPA Asbestos-in-Schools Identification and Notification Rule* (Office of Pesticides and Toxic Substances, Exposure Evaluation Division) (October 1984) (excerpts included in Appendix 2 to Class Plaintiffs' Appellee Brief to the Third Circuit Court of Appeals).

the EPA's study, some 31,000 private and public schools were affected.[8]

The Asbestos School Hazard Detection and Control Act of 1980, 20 U.S.C. § 3601, *et seq.*, directed the United States Attorney General to prepare a report on the legal responsibility for the costs of asbestos abatement remedial action. In 1981, the Attorney General filed his report (J.A.0000705-805), recommending that litigation be instituted against the asbestos industry on behalf of the schools to recover the costs of remedial action, including testing and analysis (J.A.0000720). *See The Attorney General's Asbestos Liability Report to the Congress, Pursuant to Section 8(b) of the Asbestos School Hazard Detection & Control Act of 1980,* page vii (Sept. 21, 1981). Following the Attorney General's Report, this class action litigation ensued. There is a strong likelihood that asbestos *property damage* litigation, following upon the heels of the Attorney General's Report, if not permitted to be litigated on a class action basis, will repeat the history of the asbestos *personal injury* litigation, with disastrous consequences.[9]

Thus, the action of the District Court and of the Third Circuit, like that of the district court in *Jenkins v. Raymark Industries, Inc.*, 109 F.R.D. 269 (E.D. Tex. 1985) (certifying asbestos personal injury class), as affirmed in *Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468 (5th Cir.), *reh'g denied*, 785 F.2d 1034 (1986), was an attempt to grapple with the

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[8] *Id.* at pages 2-3. Prior to the issuance of Pretrial Order No. 20 (J.A.0000327-28), plaintiffs submitted to the District Court below, as Exhibit J (J.A.0000939-68) to their motion for class certification (J.A.0000485-91), a September 15, 1983 U.S. Department of Education report to Congress on asbestos in the schools, which estimated that "14,000 schools contain asbestos hazards requiring abatement . . . [and that] the total estimated cost of asbestos removal from school buildings would be $1.4 billion." (J.A.0000968).

[9] The certification of the instant class has tolled the running of the statute of limitations for all class members. *See Chardon v. Fumero Soto*, 462 U.S. 650, 654 (1983); *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 550-51 (1974). Thus, there has been no need for individual schools to file claims to protect themselves in this regard. Decertification of the class, however, would almost certainly open the floodgates.

morass of asbestos litigation, which has caused an unprecedented backlog in the courts of this country. Recognizing the intractible problems that case-by-case litigation in the personal injury asbestos litigation has engendered, as well as the "staggering costs that the asbestos personal injury litigation has generated", 104 F.R.D. at 433 (J.A.0000311), the District Court conditionally certified a Rule 23(b)(3) class for compensatory damages. While pragmatically noting that the management of the litigation as a class action was not "wholly without difficulty", 104 F.R.D. at 434 (J.A.0000314), the District Court believed that, at this time, a Rule 23(b)(3) class action should be attempted, since, "[n]otwithstanding the difficulty, 'the proposed class action appears superior to the only existing alternative, which is repetitive individual litigation.'" 104 F.R.D. at 434 (J.A.0000315), *quoting Wolgin v. Magic Marker Corp.*, 82 F.R.D. 168, 179 (E.D. Pa. 1979).

On appeal, the Third Circuit, exercising full appellate jurisdiction under 28 U.S.C. § 1292(b) over the entire class certification order, vacated the mandatory Rule 23(b)(1)(B) class for punitive damages and upheld the District Court's denial of certification of a mandatory Fed.R.Civ.P. 23(b)(2) class (three defendants—none of the petitioners herein—sought a review of that denial), recognizing that these two aspects primarily involved questions of law.[10] However, it also recognized that the District Court had "determined that the class action was superior to the only existing alternative—repetitous individual litigation". 789 F.2d at 1000. Accordingly, relying in part upon the "background of the asbestos scene," *id.* at 1000, and acknowledging that its decision therefore was based in part upon "the highly unusual

[10] It was a discrete legal question involving only the Rule 23(b)(1)(B) class certification—namely, the possible violation of the Anti-Injunction Act, 28 U.S.C. § 2283—that was the basis for the appeal under 28 U.S.C. § 1292(b). Although the Third Circuit granted the appeal on this issue, under Third Circuit precedents, that court, when granting a § 1292(b) appeal from a district court's order, generally reviews all aspects of the order. *See School Asbestos*, 789 F.2d at 1002.

nature of asbestos litigation", *id.* at 1011,[11] the Third Circuit affirmed the District Court in its exercise of discretion in certifying the Rule 23(b)(3) class.[12]

It is only *this* discretionary action by the District Court, involving a determination on matters with which the district court "generally has a greater degree of expertise and familiarity than does an appellate court", 789 F.2d at 1011, an action conditioned upon the District Court's continued view that manageability problems can be overcome, *id.*,[13] that the petitioning defendants, in their July 29, 1986 Petition for a Writ of Certiorari, seek to have this Court review.

The Court should deny the writ of certiorari requested by petitioners because the Third Circuit's affirmance of the District Court's class certification determination presents no overriding issue of law or conflicts among the Circuits which requires review by this Court. Class certification in this litigation takes place in the unprecedented context of asbestos-related litigation which has severely taxed the capacities of both the federal and state judicial systems, and which has proved to be ineffective in permitting just and speedy compensation to victims. Two

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[11] The Third Circuit emphasized, as had the District Court, that "the undeniable limitations of the 'one-on-one' approach in coping with the massive onset of [asbestos] claims now in the courts have caused serious and justified concern", 789 F.2d at 1000-01, and that "[i]nefficiency results primarily from relitigation of the same basic issues in case after case," *id.* at 1001, concluding that its "necessarily brief . . . sketch of the background of asbestos litigation is enough to show that this is not a routine class action", *id.*

[12] On June 2, 1986, the Third Circuit denied petitions for rehearing and rehearing *en banc* from its May 1, 1986 decision.

[13] The Third Circuit, "point[ing] out the critical fact that certification is conditional", and that the District Court can "decertify if the issues it has classifed as substantial later appear insufficient to justify the class procedure", found that a reversal of the certification would be improper "before the district judge has had an opportunity to put the matter to a test". 789 F.2d at 1011.

federal courts, in well-supported and well-reasoned opinions, have independently concluded that the procedural device of a class action, an "innovation" for asbestos-related litigation, may prove to be of utility in assisting in resolving, or at least helping to contain, this mushrooming litigation, and thus should be attempted on a conditional basis.

The class certification decision and its affirmance by the Third Circuit were exercises of the sound discretion of both Courts in accordance with this Court's unwaivering rule that class certification decisions should be deferred to the broad discretion of the trial court, *Cooper v. Federal Reserve Bank of Richmond,* 467 U.S. 867, 104 S.Ct. 2794, 2802 (1984); *Califano v. Yamasaki,* 442 U.S. 682, 703 (1979), to facilitate and effectuate the Rule 23 policies of judicial economy, *see Gulf Oil Co. v. Bernard,* 452 U.S. 89, 99 n.11 (1981), and of allowing broad relief, *see Phillips Petroleum Co. v. Shutts,* ___ U.S. ___, 105 S.Ct. 2965, 2974 (1985); *Gulf Oil,* 452 U.S. at 99 n.11. Indeed, it is inconceivable that the conditional certification of a class action, under the circumstances of asbestos-related litigation, would present an issue of federal law, judicial policy or fundamental fairness warranting interlocutory review by this Court.

The Third Circuit's action herein is not unprecedented either in the asbestos area, *see Jenkins v. Raymark Industries, Inc.,* 782 F.2d 468 (5th Cir. 1986), *reh'g denied,* 785 F.2d 1034 (5th Cir. 1986) (upholding certification of district-wide class action involving approximately 893 personal injury asbestos cases), or in allowing a nationwide class action to proceed under the potentially varying products liability laws of all states and territories in the country, *see In re "Agent Orange" Product Liability Litigation,* 100 F.R.D. 718 (E.D.N.Y. 1983), *petition for writ of mandamus denied sub nom. In re Diamond Shamrock Chemicals Co.,* 725 F.2d 858 (2d Cir.), *cert. denied sub nom. Diamond Shamrock Chemicals Co. v. Ryan,* 465 U.S. 1067 (1984). More important, the petitioners' contentions that the Third Circuit's decision presents a conflict with a decision of the United States Court of Appeals for the Ninth Circuit, and that the decision somehow sanctions departures by the District Court from the accepted and usual course of judicial proceed-

ings, ignore the basic fact that the District Court's discretionary ruling on the Rule 23(b)(3) class, as upheld by the Third Circuit, was premised on a finding that this *particular* action, involving its peculiar facts, should be so certified, on a conditional basis. The District Court's application of *settled* federal procedural law to the specific facts before it, and the Third Circuit's affirmance of that application, is fully in accord with existing precedent—including that from the Ninth Circuit—recognizing that the responsibility for making the discretionary determination whether to certify such a class should rest with the district court. Thus, the petition for writ of certiorari should be rejected as nothing more than a premature request for this Court to review two lower courts' consistent, but discretionary, application of settled federal procedural law under Rule 23 to specific facts arising under state common law.

REASONS FOR NOT GRANTING THE WRIT

I.

THE THIRD CIRCUIT'S DECISION DOES NOT SANCTION AN IMPERMISSIBLE VEHICLE FOR THE ADJUDICATION OF THE INSTANT SCHOOL CLASS MEMBERS' ASBESTOS-RELATED CLAIMS

Petitioners' attempt to fit within the contours of S.Ct. Rule 17.1(a) by arguing that the Third Circuit's decision "is contrary to a long history of class action jurisprudence", and hence that it "will sanction significant departures from the accepted and usual course of judicial proceedings", Petition for Writ of Certiorari at 5, 6 (hereinafter, "Petition"), must fail. The basic support for this contention is a string cite of federal and state cases where class certification has been denied, coupled with the declaration that "courts, with rare exception, have recognized that class action treatment is inappropriate for resolution of the predominantly *uncommon* questions of fact and law inherently characteristic of products liability and toxic tort actions." *Id.* at 6 (emphasis in original). In other words, they argue that, because other courts have, on different facts, denied certification of a class in cases falling under the general category of "products liability and toxic tort actions", therefore *all* such

cases technically falling under that category inherently cannot satisfy the requirements of Rule 23.

The petitioners' argument is premised upon an erroneous understanding of the case-by-case nature of the factually-based determination whether to certify a class under Rule 23(b)(3), a matter within the sound discretion of the district court. As noted by this Court in *Cooper v. Federal Reserve Bank of Richmond,* 467 U.S. 867, 104 S.Ct. 2794, 2802 (1984), it is for the district court in the first instance to decide, as a matter of judicial administration, what issues, if any, are appropriate for class-wide treatment. *See also Califano v. Yamasaki,* 442 U.S. 682, 703 (1979) ("certification of a nationwide class, like most issues arising under Rule 23, is committed in the first instance to the discretion of the district court"); *Marshall v. Holiday Magic, Inc.,* 550 F.2d 1173, 1176-77 (9th Cir. 1977); *Bermudez v. United States Dept. of Agriculture,* 490 F.2d 718, 725 (D.C. Cir.), *cert. denied sub nom. Butz v. Bermudez,* 414 U.S. 1104 (1973).[14] Further, with respect to the findings of both a predominance of common questions and the superiority of a Rule 23(b)(3) class over individual litigation, the only findings challenged by the petitioners herein, the Third Circuit simply followed the extensive case law recognizing that the district court is as well situated as, if not better situated than, an appellate court to make these determinations. *School Asbestos,* 789 F.2d at 1011, *citing Link v. Mercedes-Benz of North America, Inc.,* 550 F.2d 860 (3d Cir.), *cert. denied,* 431 U.S. 933 (1977). *See Lerwill v. Inflight Motion Pictures, Inc.,* 582 F.2d 507, 512-13 (9th Cir. 1978); *Katz v. Carte Blanche Corp.,* 496 F.2d 747, 756-57 (3d Cir.) (*en banc*), *cert. denied,* 419 U.S. 885 (1974). Both of these determinations involve the careful weighing of the relative benefits of the two modes of litigation as they relate to the ability of the courts efficiently to rule on the claims involved.

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[14] However, in making this discretionary determination, the district court must be cognizant of the fact that "Rule 23 expresses 'a policy in favor of having litigation in which common interests, or common questions of law or fact prevail, disposed of where feasible in a single lawsuit.' " *Gulf Oil Co. v. Bernard,* 452 U.S. 89, 99 n. 11 (1981), *quoting Rodgers v. United States Steel Corp.,* 508 F.2d 152, 163 (3d Cir.), *cert denied,* 423 U.S. 832 (1975). *Accord Califano v. Yamasaki,* 442 U.S. 682, 690 (1979) ("unnecessary duplication of actions . . . the evil that Rule 23 was designed to prevent").

Petitioners have made a transparent attempt to obfuscate the discretionary nature of the Rule 23 determination through their effort to fabricate, from a scorecard of class certification denials, a *per se* rule of *law* that all "products liability and other toxic tort actions are inappropriate for class action treatment." Petition at 9. This effort ignores the numerous "products liability and toxic tort actions" and environmental cases in which class certification *was* granted,[15] as well as the numerous

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[15] *See, e.g., Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468 (5th Cir.) (class of asbestos personal injury victims upheld for purposes of litigating certain defenses), *reh'g denied*, 785 F.2d 1034 (1986); *Sterling v. Velsicol Chemical Co.*, No. 78-1100, slip op., at 2 (W.D. Tenn. Aug. 1, 1986) (class seeking recovery for personal injury and property damage arising from leakage from toxic dump site); *Joseph v. General Motors Corp.*, 109 F.R.D. 635 (D. Colo. 1986) (class of purchasers of defective automobile engines); *Walsh v. Ford Motor Co.*, 106 F.R.D. 378 (D.D.C. 1985) (class of purchasers of defective automobile transmissions); *In re "Agent Orange" Product Liability Litigation*, 100 F.R.D. 718 (E.D.N.Y. 1983) (class of Vietnam veterans and their families seeking damages for injuries arising from exposure to toxic herbicide); *In re Three Mile Island Litigation*, 87 F.R.D. 433 (M.D. Pa. 1980) (classes of businesses and individuals within 25-mile radius seeking damages for economic harm due to Three Mile Island nuclear accident); *Ouellette v. International Paper Co.*, 86 F.R.D. 476 (D. Vt. 1980) (class of lakefront property owners seeking damages for economic harm caused by pollution of Lake Champlain); *Pruitt v. Allied Chemical Corp.*, 85 F.R.D. 100 (E.D. Va. 1980) (class of fisherman seeking recovery for economic harm due to water pollution); *Bentkowski v. Marfuerza Compania Maritima, S.A.*, 70 F.R.D. 401 (E.D. Pa. 1976) (class of passengers of cruise ship injured by food and/or water poisoning); *Hernandez v. Motor Vessel Skyward*, 61 F.R.D. 558 (S.D. Fla. 1973) (class of passengers of cruise ship injured by food or water poisoning); *Biechele v. Norfolk & Western Railway Co.*, 309 F.Supp. 354 (N.D. Ohio 1969) (class of property owners seeking injunction and recovery for property damage and physical injury due to emission of coal dust from defendant's coal storage facility); *Louisville & Nashville Railroad v. Wollenmann*, 180 Ind. App. 588, 390 N.E.2d 669 (class seeking damages for economic harm resulting from evacuation due to railroad tank car spilling liquid propane), *reh'g denied*, 180 Ind. App. 593, 392 N.E.2d 1000 (1979); *Lucas v. Pioneer, Inc.*, 256 N.W.2d 167 (Iowa 1977) (class of purchasers of defective corn syrup); *Millet v. Rollins Environmental Services of Louisiana, Inc.*, 428 So.2d 1075 (La. Ct. of App., 1st Cir.), *cert. denied*, 433 So.2d 153 (La. 1983) (class of residents injured by release of fumes and odors from hazardous waste disposal facility); *Danyo v. Great Lakes Steel Corp.*, 93 Mich. App. 91, 286 N.W.2d 50 (1979) (class of past and present property owners

(footnote continues)

other "mass tort" cases where class certification has been granted.[16]

Furthermore, none of the cases cited by petitioners in support of their contention that there is a *per se* rule against such class certifications supports the existence of this purported rule. For example, the precedent upon which petitioners principally rely is the decision of the United States Court of Appeals for the Ninth Circuit in *In re Northern District of California "Dalkon Shield" IUD Products Liability Litigation,* 693 F.2d 847 (9th Cir. 1982) ("*Dalkon Shield*"), *cert. denied sub nom. A.H. Robins Co. v. Abed,* 459 U.S. 1171 (1983). The very quotations from that decision which the petitioners have

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(footnote continued)

seeking injunctive relief and recovery for personal injury and property damage due to air and noise pollution caused by nearby chemical, steel, and electrical companies and municipality); *Oakwood Homeowners Association v. Ford Motor Co.,* 77 Mich. App. 197, 258 N.W.2d 475 (1977) (class of property owners seeking injunctive relief and recovery for property damage, physical injury, and risk of physical injury due to pollutants emitted by several neighboring manufacturing plants); *Board of Education of the School District of the City of Detroit v. The Celotex Corp.,* No. 84-429634 NP, slip op. (Mich. Cir. Ct., Wayne Cty. Sept. 6, 1985) (class of school districts seeking compensatory damages and equitable relief due to asbestos in school buildings); *Marks v. C.P. Chemical Co.,* No. 053,825, slip op. (Ct. of App., 8th Dist. Jan. 16, 1986) (reversing trial court's refusal to certify class of home owners injured by urea-formaldehyde insulation in their homes), *reh'g denied* (Ohio S. Ct. July 18, 1986); *Hurt v. Midrex Division of Midland Ross Corp.,* 276 Or. 925, 556 P.2d 1337 (1976) (class of owners of automobiles damaged by particulates from employer's plant); *Cipriani v. Sun Pipe Line Co.,* No. 83-03558-09-5, slip op. (Pa. Ct. C.P., Bucks Cty. Feb. 21, 1985) (class of homeowners and residents seeking compensation for property damage, present and future personal injuries and emotional distress due to ruptured oil pipeline); *Floyd v. Philadelphia,* 8 D & C 3d 380 (Pa. Ct. C.P. Phila. Cty. 1978) (class seeking recovery for personal injuries due to leak of chlorine gas).

[16] *See, e.g., In re City of Philadelphia Litigation,* No. 85-2745, slip op. (E.D. Pa. May 16, 1986) (fire); *McQuilken v. A & R Development Corp.,* 576 F.Supp. 1023, 1032 (E.D. Pa. 1983) (nuisance due to construction work); *In re Federal Skywalk Cases,* 95 F.R.D. 483 (W.D. Mo. 1982) (hotel skywalk collapse); *In re Louisville Explosions Litigation,* Master File No. C-81-0080-L(B), slip op. (W.D. Ky. Nov. 18, 1981) (explosion in city sewers); *Coburn v. 4-R Corp.,* 77 F.R.D. 43 (E.D. Ky. 1977) (fire); *American Trading & Production Corp. v. Fischbach & Moore, Inc.,* 47 F.R.D. 155 (N.D. Ill. 1969) (fire).

selected for inclusion in their petition belie the existence of any rule of law against class certifications in the products liability/toxic tort area. This decision simply notes that " '[i]n products liability actions . . . individual issues *may* outnumber common issues.' " Petition at 8, *quoting Dalkon Shield,* 693 F.2d at 853 (emphasis added). Indeed, the Ninth Circuit expressly noted that it was "not necessarily ruling out the class action tool as a means for expediting multi-party product liability actions *in appropriate cases. . . .*" 693 F.2d at 851 (emphasis added). *See also Mertens v. Abbott Laboratories, Inc.,* 99 F.R.D. 38, 41 (D.N.H. 1983) (as quoted by petitioners, Petition at 11, court, in personal injury case, found that " 'a determination in principle would serve no useful purpose in resolving the individual claims made *in this action. . . .*' " (emphasis added).[17]

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[17] The *Mertens* Court, in a passage quoted by petitioners, recognized that " 'common questions need not be dispositive of the entire action . . .' " for a predominance of common questions to be found. Petition at 11, *quoting Mertens,* 99 F.R.D. at 41. The Third Circuit also recognized that a predominance of common questions properly can be found to exist where the resolution of the common questions so identified will " 'significantly advance the resolution of the underlying hundreds of cases.' " *School Asbestos,* 789 F.2d at 1010, *quoting Jenkins,* 782 F.2d at 472-73. This test has been adopted by numerous courts, following the pragmatic interpretation of Rule 23 suggested by Professors Wright and Miller, who note that "when common questions represent a *significant aspect* of the case and they can be resolved for all members of the class in a single adjudication, there is a clear justification for handling the dispute on a representative rather than on an individual basis." 7A C. Wright & A. Miller, *Federal Practice & Procedure* § 1778, at 53 (1972) (emphasis added) (reiterated in C. Wright, A. Miller & M. Kane, *Federal Practice & Procedure* § 1778, at 528 (2d ed. 1986)). *See, e.g., Jenkins,* 782 F.2d at 472-73; *Joseph v. General Motors Corp.,* 109 F.R.D. 635, 641 (D. Colo. 1986); *Walsh v. Ford Motor Company,* 106 F.R.D. 378, 393 (D.D.C. 1985); *In re Agent Orange Product Liability Litigation,* 100 F.R.D. at 722. *See also Mertens,* 99 F.R.D. at 41, *citing* § 1778.

As further noted by the Third Circuit, assuming that only certain significant questions can be resolved on a classwide basis, it still is appropriate to certify the class, since, "[e]ven if the action thereafter 'degenerates' into a series of individual damage suits, the result nevertheless works an improvement over the situation in which the same separate suits require adjudication on liability using the same evidence over and over again." *School Asbestos,* 789 F.2d at 1008, *citing Hernandez v. Motor Vessel Skyward,* 61 F.R.D. 558 (S.D. Fla. 1973).

Thus, contrary to petitioners' contentions, the Third Circuit's comments that " 'there is a growing acceptance of the notion that *some* mass accident situations *may* be good candidates for class action treatment' and that courts are 'reassess[ing] . . . the utility of the class action in the mass tort area,' " Petition at 10, *quoting School Asbestos,* 789 F.2d at 1008 (emphasis added), hardly stand "in sharp contrast to the Ninth Circuit's discussion of this precise matter in *Dalkon Shield",* Petition at 10. *Both* courts expressly recognized that the determination whether to certify a class must depend upon an independent review of each individual case.

Similarly, petitioners' reliance upon the Note of the Advisory Committee to Rule 23 concerning "mass accidents" also cannot support the elusive "rule of law" against mass tort class certifications from which the Third Circuit's decision purportedly "departs". The Note states that "[a] 'mass accident' resulting in injuries to numerous persons *ordinarily* is not appropriate for a class action . . . ." 39 F.R.D. 69, 103 (1966) (emphasis added).[18] While, as the Third Circuit indicated, *see School Asbestos,* 789 F.2d at 1008, the Note has repeatedly been questioned, *see Jenkins v. Raymark Industries, Inc.,* 782 F.2d 468, 473 (5th Cir.), *reh'g denied,* 785 F.2d 1034 (1986); *In re Agent Orange Products Liability Litigation,* 100 F.R.D. 718, 722 (E.D.N.Y. 1983), or has been harmonized in the certification of mass tort cases, *see, e.g., Ouellette v. International Paper Co.,* 86 F.R.D. 476, 481 (D.Vt. 1980), it is clear that the Note, like *Dalkon Shield* and *Mertens,* only states a general proposition in no way suggesting that mass tort cases "inherently" cannot properly be certified for class treatment.

Thus, it is apparent that there is no "accepted and usual course of judicial proceedings" with respect to class certifications in the products liability/toxic tort area, let alone a "departure" therefrom by the Third Circuit's decision. The

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[18] The Note technically is inapposite because the instant case deals with property damage incurred due to the *risk* of personal injuries, and not varying physical injuries of potentially multiple causes. The Third Circuit noted that property damages cases, in contrast with personal injury cases, such as *Dalkon Shield,* involve diminished "emotional" aspects, as well as simplified causation, and thus are generally more appropriate for class treatment. *See School Asbestos,* 789 F.2d at 1009, 1010.

Court of Appeals applied the settled law under Rule 23 governing class certifications to the specific facts before it—a case involving property damage resulting from the presence of asbestos in the class members' school buildings. Accordingly, the fact that the Third Circuit affirmed the certification of a class action in the products liability/toxic tort area does not warrant a review by this Court under S.Ct. Rule 17.1(a).[19]

II.

THE THIRD CIRCUIT'S DECISION DOES NOT REQUIRE SUPREME COURT REVIEW BECAUSE OF ITS RECOGNITION THAT THE DISTRICT COURT, AS IN MANY TOXIC TORT ACTIONS, MUST DETERMINE WHETHER THERE IS ANY SAFE LEVEL OF EXPOSURE TO ASBESTOS FIBERS

In seeking to fit within some provision of S.Ct. Rule 17.1(a), petitioners are reduced to the argument that the Third Circuit "has sanctioned the judicial establishment, on a nationwide level, of standards governing the use of products . . . in all toxic tort and products liability cases that can be brought . . . as purported class actions", and that the establishment of such standards inherently violates the separation of powers and federalism. Petition at 12.[20] The argument erroneously pre-

[19] For the same reasons, the Third Circuit's decision involving asbestos property damage can hardly be considered to be "in conflict with the decision of another federal court of appeals [Ninth Circuit] *on the same matter* . . . ." S.Ct. Rule 17.1(a) (emphasis added). Indeed, no decision "on the same matter" has been rendered by any federal court, let alone by another Circuit, or by any state appellate court. While the court in *Board of Ed. of the School District of the City of Detroit v. The Celotex Corp.*, No. 84-429,634 NP, slip op. (Mich. Cir. Ct., Wayne Cty. Sept. 6, 1985), agreed with and relied upon the District Court herein in certifying a statewide school class, the only decision *contrary* to the Third Circuit's decision on essentially the same facts is *Cleveland Bd. of Ed. v. Armstrong World Industries, Inc.*, 22 Ohio Misc.2d 18, 476 N.E.2d 397 (Ct. C.P. 1985), involving an Ohio trial court's application of Ohio rules and a conclusion not to certify such a statewide class. If anything, these different results reflect the discretionary nature of a class certification determination.

[20] This argument begs the question, since a case can be *certified* as a class action only if the determination of central questions will apply equally to all class members (as the two courts below found it would).

sumes that a factual finding on the danger point of a toxic substance is *never* a proper factual matter for determination by the courts in any common law tort action.[21]

The absurdity of this proposition is manifest. The District Court herein, as with any state or federal court confronted with a tort case under state common law, must decide, as a factual matter, whether the product or substance which is the basis of the lawsuit does in fact present an unreasonable risk of harm. *Cf. Knippen v. Ford Motor Co.*, 546 F.2d 993, 999-1000 (D.C. Cir. 1976) (federal courts must establish standards of care for automobile safety design in common law cases brought under state products liability law, despite possible "advantages" of a "legislative approach to establishing reasonable design standards"). Such determinations, which merely apply existing law to discrete facts in a case or controversy, are at the heart of the judicial process.

Petitioners' reliance upon the fact of the *pendency* of Congressional or federal administrative action purportedly considering whether there is any safe level of exposure to asbestos fibers in school buildings, and, if so, what that level is, is similarly unfounded. As a matter within the accepted and usual course of judicial proceedings, the federal courts regularly make factual determinations under common law even though the same factual issue is being considered by, and may be the subject of prospective legislation or a regulation by, the Congress or an administrative agency. *See, e.g., Knippen v. Ford Motor Co.*, 546 F.2d 993, 999-1000 (D.C. Cir. 1976).[22] No affront to the separation of powers doctrine is presented by such factual determinations.

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[21] If petitioners' contention were correct, a common law action could never be brought involving a toxic substance the dangers of which were contested, even if the case were *not* a class action, because there would be the factual question for resolution of whether any exposure to the substance was harmful or, if not, whether a certain level of exposure was harmful, a matter assertedly within the exclusive domain of the legislature or an administrative agency.

[22] Indeed, even if such prospective legislation or regulation actually were passed or adopted, and it concluded that there *was* a safe level of exposure to asbestos fibers in school buildings, this would not relieve defendants of

(footnote continues)

The same response applies to petitioners' argument that a determination of this factual question when it also is being considered by state legislative or administrative bodies would violate "federalism". As with the alleged "separation of powers" argument, this contention ignores the basic duty of courts to decide a factual question directly brought before them in an adversary proceeding, regardless of the pending consideration of the same question by other governmental bodies.[23]

III.

THE THIRD CIRCUIT'S DECISION DOES NOT REQUIRE SUPREME COURT REVIEW BASED UPON ITS ANALYSIS OF THE PROOF THAT PLAINTIFFS PROPOSE TO OFFER TO ESTABLISH THEIR CLAIMS

The petitioners also contend that the Third Circuit's asserted failure to subject plaintiffs' claims to an analysis of the "proof [plaintiffs] propose to offer to establish those claims" renders its decision "in conflict with the decision of [other] circuits". Petition at 14, 15. In so arguing, petitioners fail to note that the Third Circuit, like these other federal circuits, *has* specifically recognized the appropriateness of this analysis in making class certification determinations under Rule 23(b)(3), and, indeed, has specifically directed the district courts in its jurisdiction to apply this analysis. *See Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 455 (3d Cir. 1977), *cert. denied*, 434 U.S.

(footnote continued)

liability to plaintiffs, since compliance with a statute or regulation cannot be the basis for establishing a lack of liability under common law. *See Complaint of Bankers Trust Co.*, 651 F.2d 160, 174 (3d Cir. 1981), *cert. denied sub nom. BP Oil, Inc. v. Bankers Trust Co.*, 455 U.S. 942 (1982); Prosser & Keeton, *Law of Torts* § 36 at 233 (5th ed. 1984); *Restatement Second of Torts* § 288 C (1965).

[23] The baselessness of petitioners' contention is underscored by their reliance upon the general policy of federalism of leaving "the various states . . . free to develop competing *solutions to complex problems*, allowing those which work well to be adopted by others as a model", Petition at 13 (emphasis added). It is not "solutions to complex problems" that the Court of Appeals recognized the District Court must determine on an across-the-board basis; rather, it must determine the discrete factual question of whether there is or is not a hazard for the purpose of establishing defendants' liability to plaintiffs.

1086 (1978). As the Third Circuit held in *Bogosian,* in determining whether common questions predominate over individual ones, the class certification inquiry focuses on the nature or method of proof likely to be offered by plaintiffs at trial in support of their claims. Further, it is precisely this analysis which the District Court undertook in certifying the instant class, *see In re Asbestos School Litigation,* 104 F.R.D. 422, 431-32 (E.D.Pa. 1984) (J.A.0000307-10), and which the Third Circuit reviewed in affirming that class certification determination. *School Asbestos,* 789 F.2d at 1009-10.

In considering the proof necessary to establish plaintiffs' claims herein, the District Court closely followed the *Bogosian* analysis, requiring a separate analysis of the nature of the proof with respect to both "violation of law" and "fact of injury" or "impact". 104 F.R.D. at 431 (J.A.0000307). Further, the District Court analyzed each of the elements of the products liability tort claims asserted herein, noting that the violation issue under *Bogosian* was equivalent to duty and breach of legal duty, and that the *Bogosian* impact issue was equivalent to factual and legal causation with the plaintiffs' injuries. *Id.* at 431-32 (J.A.0000307-10).

With respect to the "violation" issue, it found that all of plaintiffs' claims arose "out of the same common nucleus of operative facts relating to defendants' conduct and the nature of asbestos products", 104 F.R.D. at 432 (J.A.0000308), and found that the four core issues "*can be established by common proof*, which, although it may be complex, does not vary from class-member school to class-member school". 104 F.R.D. at 429 (J.A.0000301) (emphasis added). Further, with respect to the "impact" or causation issue, the District Court again applied the *Bogosian* Court's direction to analyze the *proof* to be offered in support of the plaintiffs' claims. 104 F.R.D. at 432 (J.A.0000309-10) (emphasis added).

Reviewing the District Court's decision, the Third Circuit agreed with its determination on the commonality of certain central questions, 789 F.2d at 1009-10, specifically noting that the District Court "believed that the *proof* of these matters

would not vary widely from one class member to another". 789 F.2d at 1009 (emphasis added). Accordingly, there is no merit to petitioners' contention that neither court below "focused on the proof [plaintiffs] propose to offer to establish [their] claims", Petition at 14.

Petitioners' real objection appears to be that they "differ sharply over the proof that is necessary to establish the claims alleged in the Complaint", Petition at 17, attacking the Third Circuit for "accept[ing] the named plaintiffs' simplistic 'theory of liability' " upon which plaintiffs' proposed proof is based, *id.* at 16. As the petitioners themselves recognize, however, "consideration of the merits of a plaintiff's claim is not appropriate in determining the propriety of class certification", *id.* at 16, *citing, inter alia, Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 177 (1974). In *Eisen,* this Court admonished that, " '[i]n determining the propriety of a class action, the question is *not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits* . . . ." 417 U.S. at 178, *quoting Miller v. Mackey International, Inc.,* 452 F.2d 424, 427 (5th Cir. 1971) (emphasis added). Thus, in the primary precedent cited by petitioners, *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation,* 691 F.2d 1335 (9th Cir. 1982), *cert. denied sub nom. California v. Standard Oil Co.,* 464 U.S. 1068 (1984), the Ninth Circuit, while refusing to examine the merits of plaintiffs' claims, simply found that "*any theory* on which [plaintiffs] *might rely* would raise predominantly individual questions", 691 F.2d at 1342 (emphasis added).

By contrast with *Petroleum Products,* in this action, the plaintiffs' theory, upon which they in fact "rely", is that the presence of asbestos-containing products in school buildings creates an unreasonable risk which, when combined with defendants' knowledge or reason to know of the risks, and the class members' asbestos-related expenditures, establishes the defendants' liability for having supplied these products without adequate warnings and testing. Based upon this theory, the merits of the factual premises of which may not be inquired into at the class certification stage, *see Eisen,* 417 U.S. at 177-78; *Jordan v. County of Los Angeles,* 669 F.2d 1311, 1321-22 (9th Cir. 1982), and plaintiffs' presentation to the District Court and

the Third Circuit of the types of proof that they intend to rely upon in support of such theory, both courts below found, at least conditionally, that this theory was susceptible to class-wide proof.

Petitioners' reliance upon their own "assert[ion] that the mere physical presence of an asbestos-containing product does *not* necessarily result in the release of any asbestos fibers or pose any hazard", Petition at 17-18 (emphasis added), is nothing more than a direct affront to *Eisen.*[24] Thus, no conflict with other Circuits is presented, the District Court, as affirmed by the Third Circuit, carefully having followed the standard procedure, recognized by various Circuits, for determining whether a class should be certified under Rule 23.

IV.

THE THIRD CIRCUIT'S DECISION DOES NOT REQUIRE SUPREME COURT REVIEW ON THE GROUNDS THAT A NATIONWIDE CLASS ACTION UNDER STATE LAW CANNOT SATISFY THE RULE 23(b)(3) SUPERIORITY REQUIREMENT

Petitioners also attempt to invoke a *per se* rule against nationwide class actions where the governing substantive law is that of the various states and territories, and thus to argue that the Third Circuit's decision under the superiority requirement of Rule 23(b)(3) "raises important questions of federal precedural law for claims governed by state substantive law and, as

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[24] Indeed, petitioners effectively concede that this objection relates not to the commonality of plaintiffs' proposed proof, but to the *merits* of their theory of liability. Thus, in arguing that the need to apply the law of the various states to plaintiffs' claims precludes the possibility of a finding that the class action is superior to individual litigation, petitioners argue that the predictions of certain states' laws will present an impossible task for the District Court. While this contention is addressed fully below, it is instructive to note that petitioners, in support of this contention, cite as "[o]ne example of this situation . . . the necessity of determining the *legal validity of the 'mere presence' theory of liability* under each state's law". Petition at 28 (emphasis added).

such, merits Supreme Court review." Petition at 20. Apart from ignoring the highly discretionary nature of the "superiority" determination under Rule 23(b)(3), *see School Asbestos*, 789 F.2d at 1011; *Link*, 550 F.2d at 864; *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 513 (9th Cir. 1978), and the fact that the appellate court affirmed the trial court's exercise of discretion in carefully weighing the relative advantages and disadvantages of a class action over individual litigation, petitioners fail to note that this Court itself has sanctioned the use of a nationwide class action "for claims governed by state substantive law".

In *Phillips Petroleum Co. v. Shutts*, ___ U.S. ___, 105 S.Ct. 2965, 2981 (1985), this Court ruled that a Kansas state court, in certifying a nationwide class of investors, could not apply Kansas law to the claims of *all* class members when the majority of them did not have any connection with Kansas. While the petitioners acknowledge this holding in *Shutts*, Petition at 20, they fail to note that the Court in *Shutts*, upon holding that the law of each jurisdiction in the country would have to be applied to the class members' claims, ordered that the Kansas court, upon remand, would have to apply such varying law, following an "interests analysis" to identify the governing law for each of the class members' claims. Thus, in *Shutts*, the Court sanctioned the use of a nationwide class under the substantive law of every jurisdiction, involving class members "resid[ing] in all 50 states, the District of Columbia, and several foreign countries", even in a state court proceeding.

Recognizing that no blanket prohibition against nationwide classes under multiple states' substantive law in fact exists, petitioners also attack, as somehow in violation of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), the findings of the District Court and the Third Circuit that the variances between the governing state products liability law were limited and that the variances that do exist could be handled through subclasses. However, based upon extensive briefing by plaintiffs, including citations to the governing products liability law of nearly every jurisdiction in the country, the District Court, exercising its discretion under the "superiority" requirement of

Rule 23(b)(3), found that, although the application of the law of each jurisdiction would present substantial problems, subclasses could be used to increase manageability and that, on balance, a nationwide class was "superior" to individual litigation. 104 F.R.D. at 434 (J.A.0000314-15).

On appeal, the Third Circuit noted class plaintiffs' "extensive analysis", finding that they had made a "creditable showing . . . that class certification does not present insuperable problems". *School Asbestos,* 789 F.2d at 1010. Relying in part upon the District Court's practical conclusion that subclasses could appropriately be used to address differences that actually exist, and consistent with its willingness to allow the District Court conditionally to proceed with the Rule 23(b)(3) class, while retaining the option to decertify if that court should become "convinced that the litigation cannot be managed", 789 F.2d at 1011, the Third Circuit concluded that "the effort [to accommodate varying state law] may nonetheless prove successful". 789 F.2d at 1010. Thus, contrary to petitioners' contention, the use of subclasses, as necessary, assures that *each* state's law will in fact be applied, in accordance with *Erie.*

To the same effect is *In re "Agent Orange" Product Liability Litigation,* 100 F.R.D. 718 (E.D.N.Y. 1983), *mandamus denied sub nom. In re Diamond Shamrock Chemical Co.,* 725 F.2d 858, 861 (2d Cir.) ("*Diamond Shamrock*"), *cert. denied sub nom. Diamond Shamrock Chemicals Co. v. Ryan,* 465 U.S. 1067 (1984). In *Agent Orange,* the district court certified a nationwide class consisting of thousands of servicemen in the Vietnam War, and their families, seeking recovery against manufacturers of the defoliant "Agent Orange" for personal injuries allegedly resulting from its use during that war, under the common law of every jurisdiction in the country. In denying *mandamus,* the United States Court of Appeals for the Second Circuit noted the district court's "declared intention to create subclasses as dictated by variations in state law", and concluded that, "[g]iven the unique aspects of this case arguably creating a need for a single dispositive trial on the common issues described above, we cannot say that the use of subclasses corresponding to variations in state law is a palpable

error remediable by mandamus." *Diamond Shamrock*, 725 F.2d at 861. While *Diamond Shamrock* involved a review upon a request for a writ of mandamus, the fact that it found no basis for granting the writ underscores the lack of any "important" question of federal procedural law involved in a discretionary conclusion that a given nationwide class action under potentially varying state products liability law satisfies the "superiority" requirement of Rule 23(b)(3).

Finally, with respect to the petitioners' reliance upon the need for the District Court to "predict" the state law for several jurisdictions as somehow prohibiting the certification of a nationwide class on "superiority" grounds, Petition at 28, they fail to note that the alternative is to have separate courts make each of those predictions. Since each prediction will involve the application of the law to the facts, and invariably the courts in those states which have not ruled on a point will turn to the law of other states which have so ruled, the determination that "superiority" was satisfied, and that a class action therefore should be allowed conditionally to proceed, was not inappropriate.[25]

In sum, the petitioners complain that the "management" of this case presents intractible problems. But "manageability" is peculiarly a matter within the discretion of the district courts which are directly confronted with the challenge of efficiently handling the class actions they certify. For this reason, a district court's judgment that a given case should be attempted as a class action should not be second-guessed on "management" grounds (particularly, as proposed by petitioners herein, a second time), before it has had an opportunity to put to the test the devices at its disposal to facilitate the manageability of that case as such an action.

---

[25] The petitioners' contention that the Third Circuit's decision requires the "District Court's unwarranted intrusion upon the products liability laws of the various jurisdictions in this case", Petition at 29, is unfounded because the Third Circuit specifically required compliance with *Erie*. Moreover, even if, in making a prediction of a state's law, the District Court were to err, this prediction would apply only to the affected parties herein and would be nonbinding on the local courts of that jurisdiction.

Thus, the Third Circuit, applying the broad discretion granted the federal courts in making the "superiority" determination under Rule 23(b)(3), found that the District Court had not abused its discretion in concluding that the case should at least be attempted as a class action, with the resolution of any management difficulties a challenge to be handled by the District Court, and the option being left open for the District Court to decertify the class if the action cannot be managed appropriately. The petitioners' disagreement with these two courts is nothing but an objection to the conditional exercise of discretion about a matter over which the District Court will have full control. Such disagreement clearly does not invoke any question warranting a premature review by this Court.

CONCLUSION

For all the above reasons, the Court should deny the request for a writ of certiorari to the Third Circuit Court of Appeals.

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No. 86-140

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

THE CELOTEX CORPORATION and
CAREY CANADA INC.,
et al.,
Petitioners

v.

SCHOOL DISTRICT OF LANCASTER,
et al.,
Respondents

REPLY BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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INTRODUCTION

This Reply Brief is submitted in response to arguments first raised by the named plaintiff school districts ("Respondents") in their Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit ("Brief in Opposition"). The Petition for Writ of Certiorari ("Petition") asks this Court to review the judgment of the Third Circuit affirming the District Court's Rule 23(b)(3) certification of a nationwide class of public and private schools ("school districts") encompassing thousands of state law products liability claims that have arisen from the use of a wide variety of asbestos-containing products in school buildings.

Faced with overwhelmingly adverse precedent denying class certification of similar products liability and toxic tort claims because of the numerous individual factual and legal questions involved, Respondents have chosen to emphasize the purported advantages to the judicial system of class litigation and to ignore the question of whether class certification in these actions is permissible under the law. Thus, the Brief in Opposition defends the lower courts' decisions as "an attempt to grapple with the morass of asbestos litigation, which has caused an unprecedented backlog in the courts of this country." *Id.* at 3-4.

The courts below, acting more as legislatures than adjudicators, permitted class certification without subjecting the claims asserted in the Complaints to the "rigorous analysis" that this Court has instructed lower courts to apply under Rule 23. *See General Telephone Co. v. Falcon*, 457 U.S. 147, 161 (1982). The District Court's cursory review of Respondents' tort claims and the range of proof offered to establish them on a class-wide basis stands in sharp contrast to the far more stringent examination required under Rule 23.

In affirming the District Court's Rule 23(b)(3) decision, the Third Circuit has rendered a decision which directly conflicts with decisions of other federal circuits and sanctions significant departures from the accepted and usual course of judicial proceedings. Unless this Court reaffirms the importance of a rigorous Rule 23 analysis, other courts are likely to engage in the same relaxation of the legal standards for class certification in future products liability and toxic tort litigation. Accordingly, the decision warrants Supreme Court review.

ARGUMENT

I. THE SIGNIFICANCE OF THE THIRD CIRCUIT'S DECISION TO FUTURE PRODUCTS LIABILITY LITIGATION OUTWEIGHS THE DISCRETIONARY ASPECTS OF CLASS CERTIFICATION

Respondents repeatedly suggest that the Third Circuit's Rule 23(b)(3) decision is unsuited for Supreme Court review because the District Court's class certification decision was a "discretionary action" and that the Third Circuit appropriately deferred to the "broad discretion of the trial court." They contend that such discretionary decisions cannot satisfy any of the standards for granting review by writ of certiorari. *See* Brief in Opposition at 5-9.[1]

Respondents' characterization of the nature of a trial court's Rule 23 determination is contrary to well-established law and, if not rejected by this Court, will eviscerate the standards of Rule 23. It is only the district court's ultimate decision to certify an action as a class action, *after* applying the standards of Rule 23, that is within the sound discretion of the court. The application

1. *But see Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 159 (1974), in which certiorari was granted to resolve some of "the complex questions surrounding petitioner's attempt to maintain his suit as a class action under Fed.Rule Civ. Proc. 23."

of the legal criteria embodied in Rule 23 is not discretionary.[2] *Cf. Eisen v. Carlisle & Jacquelin*, *supra*, 417 U.S. at 176 (individual notice to identifiable class members is not discretionary; it is an unambiguous requirement of Rule 23). The ultimate issues presented by the Petition are whether the lower courts properly applied the legal standards for class certification and whether overriding legal barriers to certification exist.

The first question in the Petition challenges the propriety of using Rule 23(b)(3) in the context of the particular type of products liability claims that are asserted in these actions. The overwhelming weight of judicial authority denies class certification where, as here, harm is allegedly sustained under varying circumstances and the claims are governed by the laws of many jurisdictions.[3]

Respondents contend that the Third Circuit merely applied "settled law," citing a number of cases in which

2. Nor is the decision to grant or deny class certification merely reviewed under an "abuse of discretion" standard on appeal. The federal courts of appeals have generally held that a district court's class certification decision will be reversed if the district court either abused its discretion or applied erroneous or impermissible legal criteria to the plaintiff's claims. *See Hatch v. Reliance Insurance Co.*, 758 F.2d 409, 416 (9th Cir.), *cert denied*, 106 S.Ct. 571 (1985); *McCarthy v. Kleindienst*, 741 F.2d 1406, 1410 (D.C. Cir. 1984); *Abrams v. Interco, Inc.*, 719 F.2d 23, 28 (1st Cir. 1983); *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 448 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978); *Carey v. Greyhound Bus Co.*, 500 F.2d 1372, 1380 (5th Cir. 1974).

3. The Petition notes, for example, that the Third Circuit's decision conflicts with the decision of the Ninth Circuit in *In re Northern District of California, "Dalkon Shield" IUD Products Liability Litigation*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983), as well as the decision of the Judicial Panel on Multidistrict Litigation, which refused to consolidate the federal school asbestos actions for pretrial purposes on the ground, *inter alia*, that it was "not persuaded th[at] common questions of fact will predominate over individual questions of fact present in each action." *In re Asbestos School Products Liability Litigation*, 606 F. Supp. 713, 714 (J.P.M.L. 1985).

class certification was granted. *See* Brief in Opposition at 13 and 9-10 n.15 and n.16. The cases cited by Respondents, however, unlike the present actions, almost exclusively involved (a) claims arising from a single event or a single product; (b) state law claims which only required the application of the law of one jurisdiction; (c) federal claims as to which the law does not differ from jurisdiction to jurisdiction;[4] or (d) claims which were litigated under state class action statutes that contain different and less stringent legal standards than Rule 23.[5] These are not the types of products liability claims that are asserted in Respondents' Complaints and, accordingly, do not support denial of the Petition.

The only two cases cited by Respondents which even remotely resemble the present actions are *In re "Agent Orange" Product Liability Litigation*, 100 F.R.D. 718 (E.D.N.Y. 1983), *petition for writ of mandamus denied sub nom. In re Diamond Shamrock Chemicals Co.*, 725 F.2d 858 (2d Cir.), *cert. denied sub nom. Diamond Shamrock Chemicals Co. v. Ryan*, 465 U.S. 1067 (1984), and *Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468 (5th Cir.), *reh'g denied*, 785 F.2d 1034 (1986).

Both of these cases, however, are distinguishable. In *Jenkins*, the plaintiffs' personal injury claims were subject only to Texas law. In *Agent Orange*, the District Court found that the types of claims and defenses asserted were peculiarly susceptible to class treatment. Indeed, the District Court in *Agent Orange* expressly found

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4. For example, in *Walsh v. Ford Motor Co.*, 106 F.R.D. 378 (D.D.C. 1985), the court certified plaintiffs' claims under the federal Magnuson-Moss Warranty Act for class treatment but refused to certify plaintiffs' state law personal injury claims.

5. For example, the Michigan and Iowa class action statutes discussed in *Danyo v. Great Lakes Steel Corp.*, 93 Mich. App. 91, 286 N.W.2d 50 (1979); *Oakwood Homeowners Association v. Ford Motor Co.*, 77 Mich. App. 197, 258 N.W. 2d 475 (1977); and *Lucas v. Pioneer, Inc.*, 256 N.W.2d 167 (Iowa 1977), were modeled after the pre-1966 Rule 23, which contained neither a predominance requirement nor a superiority requirement.

that *no* defenses to liability existed that would affect the individual plaintiffs in different ways. *See* 100 F.R.D. at 723. By contrast, the Third Circuit noted the "significant case management concerns" posed by individualized defenses to Respondents' claims. *In re School Asbestos Litigation*, 789 F.2d 996, 1011 (3d Cir. 1986).

More fundamentally, the Third Circuit itself recognized that this litigation is "an unprecedented situation" and "not a routine class action." *Id.* at 1011, 1001. Its decision reflects a relaxation of the requirements of Rule 23, despite "formidable problems," in order to foster settlement of the claims. *Id.* at 1009. The Third Circuit thus has sanctioned a significant departure from the accepted and usual course of judicial proceedings.

For these reasons, this Court should grant review.

II. THE THIRD CIRCUIT'S DECISION SANCTIONING THE JUDICIAL ESTABLISHMENT OF AN ACROSS-THE-BOARD NATIONWIDE EXPOSURE STANDARD WILL IMPAIR ESTABLISHED PRINCIPLES OF FEDERALISM AND THE SEPARATION OF POWERS

The second question presented seeks review of whether a nationwide determination by the District Court of the level at which airborne asbestos fibers constitute a hazard in all schools would violate overriding principles of the separation of powers and federalism.

Respondents assert that this question "presumes that a factual finding on the danger point of a toxic substance is *never* a proper factual matter for determination by the courts in any common law tort action." *See* Brief in Opposition at 13-14 (emphasis in original). They then invoke "the basic duty of courts to decide a factual question directly brought before them in an adversary proceeding" to suggest that the second question does not merit review. *Id.* at 15.

Respondents, however, are not asking the District Court merely "to decide a factual question. . . ." They want a determination of the purportedly common question of "the general health hazards of asbestos" and a nationwide remedial decree. These are questions of public policy; and it is by treating these policy issues as Rule 23 "common questions" that the courts below have invaded the provinces of Congress, the federal Environmental Protection Agency and the States in violation of the principles of federalism and the separation of powers.

Respondents' reference to automobile safety, as discussed in *Knippen v. Ford Motor Co.*, 546 F.2d 993 (D.C. Cir. 1976), *see* Brief in Opposition at 14, presents an instructive parallel. *Knippen*, of course, was an individual action — not a class action — and did not present the question of a nationwide standard for automobile safety.

The question of a nationwide standard *was* presented, however, in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983), a case not cited by Respondents. In the *Motor Vehicle* case, this Court conducted a detailed review of the decision of the National Highway Traffic Safety Administration ("NHTSA") to rescind a safety standard requiring automatic seatbelts or airbags in automobiles. This Court concluded that the NHTSA had failed to supply the requisite "reasoned analysis" for its rescission and remanded the case to the NHTSA. *Id.* at 57.

Under Respondents' class action theory — sanctioned by both courts below — this Court's painstaking review of agency action in the *Motor Vehicle* case was entirely unnecessary. If Respondents are correct, State Farm simply could have bypassed the NHTSA by filing a nationwide class action seeking a determination of the common "factual" question of the "general health hazards of automobiles without airbags." Under Respondents' theory, the District Court then could make a "factual determination" that automobiles without

airbags "present an unacceptable hazard" and could enter a nationwide remedial decree. *Cf.* 789 F.2d at 1009.

Simply put, the type of determination Respondents seek is legislation, not adjudication. A single federal district court, sitting in diversity, is not the proper forum to make such a broad policy decision. Under the Constitution, "common question" decisions of public policy are committed to the executive and legislative branches of the federal government and the states. The Third Circuit's decision failed to recognize the proper limits of judicial action and thus merits Supreme Court review.

III. THE DECISIONS OF THE COURTS BELOW DO NOT REFLECT THE REQUISITE RULE 23(b)(3) ANALYSIS

The third question presented for review is whether the two lower courts, in making their Rule 23(b)(3) determinations, failed to apply the requisite legal analysis to Respondents' claims and the proof they propose to offer to establish those claims.

Respondents acknowledge, for the first time, that "the class certification inquiry focuses on the nature or method of proof likely to be offered by plaintiffs at trial in support of their claims." Brief in Opposition at 16. They argue, however, that the lower courts *did* perform such an analysis on their claims and their theory of liability. *Id.* at 17-18.[6]

Contrary to Respondents' argument, it is not sufficient under Rule 23 that a plaintiff's chosen theory of

6. Respondents have made no secret of the type of proof they intend to offer to prove their claims:

> [T]he plaintiffs' theory . . . is that [1] the presence of asbestos-containing products in school buildings creates an unreasonable risk which, when combined with [2] defendants' knowledge or reason to know of the risks, and [3] the class members' asbestos-related expenditures, establishes the defendants' liability for having supplied these products without adequate warnings and testing.

Brief in Opposition at 17.

liability merely be susceptible to class-wide proof. Those circuits that have decided the issue have held that class certification is improper if the particular theory of liability and the proof offered to establish that theory are not sufficient to establish the elements of the plaintiff's claims on a class-wide basis.[7] *See* Petition at 16-17.

Even the most cursory reading of the opinions below reveals that the courts did *not* examine Respondents' theory or proposed proof to determine whether that theory or proof would establish (or even advance) Respondents' claims on a class-wide basis. Respondents can only point to the Third Circuit's statement that "the District Court believed that the proof of [the four issues the District Court identified] would not vary widely from one class member to another." *In re School Asbestos Litigation*, *supra*, 789 F.2d at 1009, quoted in Brief in Opposition at 16-17. Since neither the District Court's "belief" nor the Third Circuit's recitation of that "belief" was based on the type of legal analysis which Respondents now concede is necessary under Rule 23, Petitioners' third question warrants Supreme Court review.

IV. THE THIRD CIRCUIT'S DECISION IGNORED THE "FAIRNESS" AND "EFFICIENCY" REQUIREMENTS OF RULE 23(b)(3)

The fourth question raised in the Petition is whether Rule 23(b)(3)'s superiority requirement can be satisfied in a case involving products liability claims to which the varying laws of over fifty jurisdictions must be applied under this Court's decisions in *Erie Railroad Co. v.*

7. This type of analysis does not involve an impermissible consideration of the merits of plaintiffs' claims in violation of *Eisen v. Carlisle & Jacquelin*, *supra*. *Eisen* only requires the lower courts to assume that plaintiffs can prove what they say they will prove. Whether that proof will establish plaintiffs' claims on a class-wide basis is a separate question and one that must be considered before a class is certified.

Tompkins, 304 U.S. 64 (1938), and *Phillips Petroleum Co. v. Shutts*, 105 S.Ct. 2965 (1985).

Respondents incorrectly assert that the fourth question merely raises issues of manageability. *See* Brief in Opposition at 19. To the contrary, this question embraces the specific determinations which underlie the superiority requirement itself: namely, whether the application of the different products liability laws of over fifty jurisdictions to thousands of claims in a single proceeding can result in a "fair and efficient adjudication" of those claims.

All parties to the litigation have an interest and, indeed, the right to insist that the appropriate governing law will be applied to the class members' claims. To this end, it is not enough simply to attempt to group the states' varying formulations of products liability standards into categories. Indeed, as the Petition demonstrates, this task is far more complex than Respondents have suggested since many jurisdictions fall within different groups with respect to different standards. Under *Erie*, the District Court, sitting in diversity, must apply those standards in the same way that a court of the appropriate jurisdiction would apply them. Furthermore, when the law of the particular jurisdiction is unclear or has yet to be declared, the District Court must predict how the highest court of the jurisdiction would decide questions of first impression.

The use of subclasses will not provide an efficient solution to the problem. As demonstrated in the Petition, at 21-22, the composition of the various subclasses will have to be changed at every procedural stage of the litigation in order to accommodate the varying alignments of state laws. This repeated, but required, reshuffling of the deck would be inefficient, confusing and prone to error.

Finally, the acquiescence of the courts below in Respondents' offer to meet "the most stringent test of

liability" in attempting to prove their claims is both a violation of the requirement in *Erie* that federal courts, sitting in diversity, apply state substantive law to the claims before them and a dangerous invitation to the unnamed class members to mount a collateral attack on the adequacy of Respondents' representation of their state law claims. *Cf. Hansberry v. Lee*, 311 U.S. 32 (1940).

For these reasons, this Court should grant review of the fourth question.

CONCLUSION

For the reasons set forth above and in the Petition for Writ of Certiorari which was filed on July 30, 1986, Petitioners request that a Writ of Certiorari issue to review the judgment of the Third Circuit affirming the District Court's Rule 23(b)(3) class certification decision.

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